IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 856 of 2005

With

CRIMINAL APPEAL No. 1459 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE STATE OF GUJARAT - Appellant(s)
Versus
VIRENDRABHAI @ NIKULBHAI AMRUTBHAI PATEL & 1 - Opponent(s)

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Appearance in CRIMINAL APPEAL NO.856 of 2005:

MR.KT DAVE, ADDL.PUBLIC PROSECUTOR for Appellant(s) : 1,
MR ABHAYKUMAR P SHAH for Opponent(s) : 1,
MR JM PANCHAL for Opponent(s) : 2,
MR KJ PANCHAL for Opponent(s) : 2,

Appearance in CRIMINAL APPEAL NO. 1459 of 2004

Mr.PM Thakkar, Ld. Senior Counsel for the appellant.

Mr.KT Dave, Ld. APP for the respondent State.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 27/12/2006

CAV COMMON JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. By this CAV common judgment, we are dealing with and disposing of two criminal appeals viz. Criminal Appeal No.1459/2004 and Criminal Appeal No. 856/2005, challenging the impugned judgment dated 09.07.2004 passed by the ld. Addl. Sessions Judge, Ahmedabad (Rural), Navrangpura, Ahmedabad in Sessions Case No.85/2000. Vide impugned judgment, the ld. Trial Judge convicted Shri Amrutbhai Bholidas Patel-Original Accused No.1 (Appellant of Cri.Appeal No.1459/2004) for the offences punishable under section 302 and 201 of Indian Penal Code as well as for the offence punishable under section 30 of the Arms Act and sentenced original accused No.1 Amrutbhai Patel to undergo R/I for life and to pay a fine of Rs.5000/, I/d to undergo S/I for 1 Year for the offence punishable under section 302 of IPC, to

undergo R/I for 3 years and to pay a fine of Rs.2000/, I/d to further undergo S/I for 6 months, to undergo S/I for 2 months and to pay a fine of Rs.500/, I/d to undergo S/I for 7 days respectively. Vide impugned judgment, the ld. Trial Judge acquitted the original accused Nos. 2 & 3 (Respondents of Criminal Appeal No.856/2005) from the offences punishable under section 302 R/w section 34 and 504 of the Indian Penal Code. Original Accused No.1 Amrutbhai Patel has preferred Criminal Appeal No.1459/2004 challenging the impugned order of conviction and sentence passed against him by the ld. Trial Judge, whereas the State has preferred Criminal Appeal No. 856/2005 challenging the impugned judgment whereby the ld. Trial Judge acquitted the original accused Nos.2 & 3. Since, both these criminal appeals arise out of common trial and evidence led is also common and arise out of one judgment, both these criminal appeals are heard together and are being disposed of by this common CAV Judgment.

2. All the three accused were charged as per the Charge Exh.21 and it would be convenient to reproduce

substantive charge framed against all the three accused persons (free translation from Gujarati vernacular):-

> " That on 20.02.2000 on or at about 15.30 hours, you wanted to construct/erect a wall with the help of labourers on the land bearing survey No.433/1 known as Shantivan Farm situated in the sim of village Makaraba and at that time, on this issue, an altercation (hot exchange of words) took place with deceased Arvindbhai Amrubhai Patel and at that time, you accused Nos.2 & 3 instigated you accused No.1 stating that this Arvind is harassing us and on this occasion, the issue should be settled finally now. Thereafter, you accused No.1 fired from your licensed Revolver and by firing shot at the chest of the deceased, Arvindbhai, caused death of the deceased and by doing so, you accused No.1 committed murder of deceased Arvindbhai and thereby committed an offence punishable under section 302 of Indian Penal code and you accused Nos. 2 & 3, with an intention to fulfill your common object/intention, abetted each other for commission of the aforesaid offensive act and thereby you both the accused Nos. 2 & 3 have committed an offence punishable under section 302 R/w Section 34 & 114 of Indian Penal Code which are triable within the jurisdiction of this Court.

Further, on the same date, time and place, you accused Nos. 2 & 3, intentionally insulted by giving abuses and thereby given provocation to the deceased Arvindbhai intending or knowing it to be likely that such provocation will cause him to breach the public peace or to commit any other offence and thereby you accused Nos. 2 & 3 have committed an offence punishable under section 504 of Indian Penal Code which is triable within the jurisdiction of this Court.

Further, on the same date, time and place, though you were knowing or having reason to believe that an offence punishable with death or life imprisonment has been committed, with an intention to screen (save) yourself from the legal punishment, you accused No.1 took away with you the Revolver used in the commission of the offence at your residence and cleaned the said weapon which has been used in the commission of the offence and caused to disappear the evidence (destroyed the evidence) by tampering with the firing pin of the said Revolver and thereby you accused No.1 has committed an offence punishable under section 201 of the Indian Penal Code which is triable within the jurisdiction of this Court.

Further, on the same date, time and place, you accused No.1 fired from your licensed

Revolver in an illegal manner by committing breach of the terms and conditions of the License and thereby you accused No.1 has committed an offence punishable under section 30 of the Arms Act which is triable within the jurisdiction of this Court. “

3. The above charge has been framed on the strength of the basic allegations made by the prosecution in the FIR as well as in the final report submitted at the conclusion of the investigation. The basic case of the prosecution is that on the date of incident, between 12.00 noon and 4.00 P.M., Police Officer Mr. Padubhai Thavrabhai Bodar was on his duty as PSI in the investigating squad of Ellisbridge Police Station of City of Ahmedabad. At that time, one person named Bharatbhai Natvarbhai Patel came to the police station and informed him that his son-in-law -deceased Arvindbhai had sustained injuries in firing and has been admitted in the Prerana Hospital and, therefore, he should come there. On receipt of this information, PSI Mr. Bodar went to Prerana Hospital and on making necessary discreet inquiry, he found that an offence occurred has been committed within the jurisdiction

of Sarkhej Police Station. Thereafter, Ellisbridge police intimated Sarkhej Police Station and Sarkhej police was asked to go to Shantivan Farm and thereafter, PSI of Sarkhej Police Station Mr. Purshottam Bhimjibhai Mer came to Prerana Hospital where the wife of the deceased Arvindbhai was sitting nearby the dead body in the hospital. There she gave details of sequence of events that had occurred. PSI Mr. Mer recorded her complaint and it is the say of the prosecution that the husband of the complainant Artiben namely Arvindbhai had left for Shantivan Farm situated in Makaraba village at about 9.00 A.M. in the morning. When she was at home, she received a telephone call from the maternal uncle of her husband namely Ambalal Jethidas Patel informing that her father-in-law i.e. accused No.1 Amrutbhai Patel is constructing a compound wall in Shantivan Farm. At that time, she had replied that her husband has already left and had gone to Shantivan Farm. At about 12.30 P.M., her husband had returned home and she was told that he has opposed construction of a compound wall and has instructed watchman Gulamnabi to inform him if they (accused persons) start constructing the

wall. Thereafter, when her husband was taking rest, at about 2.30 P.M., the deceased Arvindbhai received a telephone call from watchman Gulamnabi informing that Amrutbhai, Virendra and Dharmendra i.e. Accused Nos. 1 to 3 respectively have come to the farm house and have started construction of the wall. Hearing that, her husband Arvindbhai went to Shantivan Farm in his Contessa car. At about 3.30 P.M., driver Dashrathbhai telephoned that Amrutbhai, Virendra and Dharmendra had quarrelled with Arvindbhai in connection with the construction of the wall and that accused No.1 Amrutbhai had fired at Arvindbhai and Arvindbhai has been taken to the hospital. Thereafter, she informed her uncle-in-law Dashrathbhai Bholidas Patel and he told her that Arvindbhai has been taken to Doctor House and, therefore, she went to Doctor House. When she reached there, she saw her brother-in-law Virendra-accused No.2 and Dharmendra-accused No.3 getting down from Maruti car bringing out her husband from the car in a stretcher. At that time when she saw the body of her husband, she found that her husband has sustained bullet injury on the right side of chest of her

husband. Arvindbhai was taken inside the hospital where he was found dead. In the hospital, her father-in-law Amrutbhai Patel- accused No.1 was also there. He was admitted and it is the say of the prosecution that thereafter accused No.1 Amrutbhai Patel under police surveillance provided by the Ellisbridge Police Station arranged by PSI Mr. Bodar, was taken to Karnavati Hospital for treatment. On the complaint of the wife of the deceased Arvindbhai, PSO Mr. PK Vaghela registered the offence being I.CR No.38/2000 at Sarkhej Police Station at 18.30 hours. After investigation, the police chargesheeted all the three accused for different offences as per the charge Exh.21 and the ld. Trial Judge, at the conclusion of trial, vide impugned judgment dated 09.07.2994 convicted the original accused No.1 and sentenced him as stated above and acquitted original accused Nos. 2 & 3.

4. The State has challenged the impugned judgment recording acquittal of original accused Nos. 2 & 3 by filing Criminal Appeal No.856/2005. We have considered the nature of grievances raised by the

State against the judgment and order of acquittal recorded in favour of original accused Nos. 2 & 3, whereas the order of conviction and sentence has been challenged by the original accused No.1 by filing Criminal Appeal No.1459/2004.

5. Considering the nature of arguments advanced before us by the ld. Counsel appearing for all the three accused as well as ld. APP Mr. KT Dave for the State of Gujarat in both the appeals, we have to deal mainly with the appeal preferred by the original accused No.1 against the order of conviction and sentence passed against him viz. Criminal Appeal No.1459/2004 because while making oral submissions, ld. APP Mr. Dave has fairly accepted that it is not easy for the State to allege that the order of acquittal qua original accused Nos. 2 & 3 is perverse or can be said to have been based on palpably wrong appreciation of evidence. However, his submission is that the judgment under challenge should be evaluated in toto and if the Court finds that acquittal recorded against original accused Nos. 2 & 3 requires to be reversed, then both these

accused can also be held guilty for the offence punishable under section 302 R/w section 114 of the IPC.

6. Ld. Sr.Counsel Mr. PM Thakkar appearing for ld. Counsel Mr. YM Thakkar appearing for the original accused No.1 in Criminal Appeal No. 1459/2004, has taken us through the various grounds of challenge and while doing so, he has taken us through the entire judgment and all relevant oral as well as documentary evidence led during the course of trial.

(i) It is submitted by ld. Sr. Counsel Mr. Thakkar that the finding of conviction recorded against the original accused No.1 is erroneous on various grounds mentioned in the memo of appeal and it is submitted that the same is based on number of surmises drawn and conjectures by the ld. Trial Judge and that too without any legal or logical base. The Court is competent to draw an inference but such inference can be drawn on the evidence either direct, indirect or circumstantial which can be said to be legal and admissible in evidence in the eyes of law.

In the present case, the prosecution has come with the theory that more than one person has witnessed the incident and one of them had sustained injuries in the scuffle that has allegedly taken place at Shantivan Farm, but at the trial, none of the eye witnesses had supported the case of the prosecution. So, according to Mr. Thakkar, there are no eye-witnesses to the incident inasmuch as three eye-witnesses on whom the prosecution intended to rely viz. (i) Employee-watchman of the deceased Arvindbhai namely Gulamnabi Mubarakkhan, (ii) Driver Dashrathbhai Shambhuji Thakor and (iii) Jashiben Chanduji Thakor, have been declared hostile. Complainant Artiben being a person concerned, had made all the arrangements to assist the Public Prosecutor appearing in the matter and she was able to get appointment of more than one Special Public Prosecutor. However, the evidence led by the prosecution is lame and infirm and the trial Court ought not to have held the accused No.1 guilty of all the aforesaid three offences on the basis of such a lame and infirm type of evidence. On the contrary, it was possible for the Court to infer that this is

a case wherein there is no legal and sufficient evidence to link the accused with the crime.

(ii) According to Mr. Thakkar, three close relatives namely (1) complainant Artiben, (2) Bharatbhai and (3) Rahulbhai -real brother of the complainant, have given their evidence in a strange manner and they are undisputedly not the witnesses to the incident in any way. When they are undisputedly not present at the scene of offence, no reliance ought to have been placed on the evidence of these witnesses and the facts stated by PW Bharatbhai have no direct bearing on the commission of the crime and their evidence as to the place of alleged incident is of hear-say nature. The version of Artiben in her deposition is not able to carry the case of the prosecution any further and only thing she has deposed before the Court is that in the morning her deceased husband had left for Shantivan Farm and she received a telephone call from maternal uncle of her husband, inter alia, informing that the accused No.1 is putting up construction of a wall and she should inform her husband about the development. This relative Shri

Ambalal Jethidas Patel named by the prosecution, though was available and cited as witness, has not been examined. She has stated that witness Ambalal Jethidas Patel was responded and in turn was informed that her husband Arvindbhai has already left for Shantivan Farm. Thereafter, according to her, her husband returned at about 12.30 noon and on asking, she was informed by her husband that construction wall was being put up in the farm house and that he had instructed the Pagi i.e. watchman Gulamnabi that till everything is over, the wall should not be put/erected and that he had also instructed that in case wall is being constructed, he should inform him. Thereafter, she had received a telephonic message about the occurrence of some incident and the fact of injury sustained by deceased Arvindbhai and about shifting of Arvindbhai to Doctor House.According to Mr. Thakkar, the say of Artiben qua the conversation that has taken place between her and Ambalal Jethidas Patel is in-admissible in evidence and ld. Trial Judge ought to have excluded that part of evidence from consideration. In the same way, the conversation between Artiben and her husband Arvindbhai that has

taken place after her husband's return from Shantivan Farm is also not admissible in evidence being hit by section 32 of the Evidence Act nor it is protected by section 6 of the Act as observed by the Apex Court in the case of **Manish Dixit v/s State of Rajasthan, 2000(7) SCC 64.** Mr. Thakkar has taken us through relevant paras 11 & 12 of the cited decision. For ready reference, relevant observations made by the Apex Court in the aforesaid decision are reproduced herein below (para-12):-

> " To obviate the said difficulty the Public Prosecutor in the trial Court made a futile attempt to render the statement made by Michel Hens to the inmates of Gulshan Makhija as evidence falling within the purview of Section 6 of the Evidence Act. That attempt gained success at the trial stage as the Sessions Judge approved the contention. But the Division Bench of the High Court has very rightly repudiated such a contention. As the counsel for the State did not make even an attempt to render such statement admissible in evidence, we are

relieved of the task to deal with that statement."

Mr. Thakkar has submitted that in the background of facts brought on record by the prosecution, it should be observed that none of the family members of the deceased who have been examined during the trial, have not led any evidence which help the prosecution in proving "who committed the crime in question, nor it implicate accused No.1 in the commission of the crime in question." It is also submitted that even for the sake of arguments it is accepted the evidence qua conversation that has taken place between Artiben and her husband Arvindbhai, it is not in any way capable of explaining as to how the crime has been committed, who have committed the crime and how accused No.1 can be held responsible for the injury that was found on the body of the person deceased. One of the arguments advanced by ld. Sr.Counsel Mr. Thakkar is that Artiben has sated that there was a telephone call from watchman Gulamnabi at about 2.30 P.M., inter alia, informing her husband that the accused have

come to the farm and they are putting up the construction of a wall. This evidence of Artiben would not be admissible in evidence in view of the fact that Gulamanabi has not supported the case of the prosecution when examined. On the contrary, he has denied this fact. He has also not accepted that he has made such a telephone call. So, in light of the observations made by the Apex Court in the case of **Vijender v/s State of Delhi, 1997 SC (Cri.) 365,** the evidence of Artiben referred to above, could not have been accepted as an admissible evidence. Mr. Thakkar has taken us through relevant para-11 of the said decision. It would be convenient to reproduce relevant observations made by the Apex Court in para-11 of the above-cited decision. Para-11 reads as under:-

> "11. The evidence of Prosecution Witness 5 that Raju gave him the number of the vehicle and the names of the three appellants as the miscreants was not legally admissible for Raju (Prosecution Witness 4) did not state that he had seen the three appellants

kidnapping Khurshid nor did he give the number of the vehicle in which Khurshid was taken away. In the absence of such direct evidence of Raju (Prosecution Witness 4), the testimony of Prosecution Witness 5 to that extent would be hit by Section 60 of the Evidence Act. The said section, so far as it is relevant for our present purpose lays down that oral evidence must, in all cases whatever, be direct; that is to say if it refers to a fact which could be seen it must be the evidence of a witness who says he saw it (emphasis supplied). In the instant case the facts which could be seen were that Khurshid was kidnapped, that the appellants kidnapped him and that he was kidnapped in Car No. DDB 5067 and therefore Prosecution Witness 4 was the only person (in absence of any other eye-witness) who was legally competent to testify about these facts. Since Prosecution Witness 4 did not testify to two of the above facts, namely the car number and the persons who kidnapped

him, the statement of Prosecution Witness 5 that he was also told about the above two facts would not be admissible being "hearsay", but his testimony that Prosecution Witness 4 told him that Khurshid was kidnapped would be admissible as corroborative evidence under Section 157 of the Evidence Act. While on this point it need be mentioned that in the facts of the present case Section 6 of the Evidence Act also does not come in aid of the prosecution."

In view of above, according to Mr. Thakkar, evidence of PW Bharatbhai, PW Rahul and/or PW Artiben in no way helps the prosecution in establishing the crime in question.

(iii) As per the evidence of P.W.5 Dr. Bhise who along with other doctors performed the post-mortem of the deceased Arvindbhai, the cause of death is the injury caused by a fire arm found on the right-side chest of the deceased. A bullet during the post-

mortem examination, was taken out by the panel of doctors and details of the post-mortem notes need appreciation in the background of the opinion evidence of other expert Mr. Modi, Forensic Scientist who examined the bullet mark-F and the muddamal Revolver mark-J along with muddamal cartridges referred to in the evidence as K-1, K-2 & K-3. Mr. Thakkar has pointed out that as per the panel of doctors performing the post-mortem, they measured and noted the description of the bullet taken out of the body of the deceased and these details found in the post-mortem notes with pictures stating diameters etc., reveal that as per Dr. Bhise who proved the post-mortem notes, bullet was of O.5 cm which measurements were taken by a scale. There is no ambiguity in oral evidence of Dr. Bhise and the post-mortem notes produced. The measurement of the bullet injury found on the right side chest was also measured and measurement of entry wound of the bullet is shown to be of 0.5 cm. A piece of skin was taken out with a view to send it to FSL expert and Dr. Bhise has said in his deposition that the entry wound hole was of 0.5 cm. Meaning thereby equal to

the diameter of the bullet found lying inside the body. Even as per the case of the prosecution, FSL expert had found one hit mark on the trunk of a tree at Shantivan Farm where the alleged crime has been committed and the diameter of the hit mark on the trunk of the tree was measured and it was found 2.00 cm x 0.5 cm. The evidence of Mr. Modi- Forensic Scientist, if considered, the bullet i.e. mark-F bullet received by him for examination allegedly taken out from the body of the person deceased was having a diameter of 0.775 cm. This conflict found in the evidence of two different sets of experts, has been relied on by the prosecution and the ld. Trial Judge, without recording any logical legal finding, has held that the prosecution has satisfactorily proved the case beyond reasonable doubt. On the contrary, it ought to have been held that the prosecution has made out two different stories. The FSL expert says that the deceased has been killed by a bullet having a diameter of 0.775 cm and the doctors who performed the post mortem say that the death was caused by a bullet of a diameter of 0.5 cm. According to Mr. Thakkar, as per the standard books,

the bullet that was found by the team of the doctors, could be fired from 0.22 caliber Revolver whereas the FSL experts have deposed that the Revolver seized from the house of accused No.1 was of 0.32 Caliber Revolver and from that Revolver, bullet mark-F could be fired. This conflict in the evidence makes the case of the prosecution doubtful. As per the settled legal position, when two sets of evidence which can be said to be inconsistent to each other are placed before the Court by the prosecution, than the court can not accept the one possible view i.e. one set of evidence by rejecting the other. The prosecution is supposed to convince the Court by offering viable explanation or the Court should reach to a positive finding that why it accepts one out of two sets of evidence. It is also necessary for the Court to say that two sets have been relied on by the prosecution can not be said to be inconsistent for the reasons and those reasons also should be mentioned by the trial Court and in the present case, the trial Court without entering into that exercise has held the accused guilty. In support of these arguments, Mr. Thakkar has placed reliance on certain observations

made by the Apex Court in the case of **Harchand Singh v/s State of Haryana, AIR 1974 SC 344.** He has taken us through relevant paras 9 & 10 of the decision. In the gist of arguments supplied to the Court, the ld. Counsel has reproduced paras 9 & 10 of the said decision and for the sake of convenience and brevity, the same are reproduced herein below:-

> 9. It cannot be disputed that a murderous assault was made on Ajaib Singh on the day of occurrence as a result of which he died. The evidence of Dr. Shamsher Singh, who examined Ajaib Singh when he was taken to Khanna hospital as well as the evidence of Dr. Gurbhachan Singh Randhawa who performed post mortem examination on the dead body, shows that as many as eighteen injuries were inflicted upon Ajaib Singh deceased. Out of them, seven had been caused by sharp-edged weapons. Death, in the opinion of Dr. Randhawa, was due to shock and hemorrhage as a result of the cumulative effect of the injuries. According to the case of the prosecution, the two appellants joined in the

assault on the deceased as a result of which the latter died. The prosecution in support of its case examined two sets of eye witnesses. The evidence of one set consists of the testimony of Amarjit Singh. Mal Singh and Teja Singh. So far as these witnesses are concerned, the trial court came to the conclusion that they were not present near the scene of occurrence and had not witnessed the occurrence. The trial court in support of this conclusion gave reasons which appear to be cogent and weighty and we find no particular ground to take a different view. The evidence of Ram Asra, who according to the prosecution case was with Ajaib Singh deceased at the time of the occurrence, shows that Amarjit Singh, Mal Singh and Teja Singh were not present at the time of the occurrence. If Amarjit Singh, Mal Singh and Teja Singh had been present at or about the place of occurrence and had actually seen the occurrence, it is difficult to believe that Ram Asra would have remained unaware of their presence. According to Amarjit Singh, Mal Singh and Teja Singh, they

saw the occurrence while they were coming from their house. They were at a distance of about 60 karams from the place of occurrence when they heard alarm being raised and on coming nearer they saw the six accused inflicting injuries upon Ajaib Singh deceased. As against that, the version of Ajaib Singh deceased in the dying declaration was that the above mentioned three witnesses were working in the field nearby when he was assaulted by the accused. Amarjit Singh, Mal Singh and Teja Singh claimed that they were proceeding from their house to the well with Tokras and Kahis for the purpose of consolidating the new channel with earth filling. If that was the purpose for which they were going to the well, they would have gone there before and in any case not after Ajaib Singh deceased so that they might prepare the channel before Ajaib Singh started operation of the Persian wheel at the well. We thus find that not only the explanation given by Amarjit Singh, Mal Singh and Teja Singh regarding their arrival at that time is not convincing, there is

material discrepancy in the version of Ajaib Singh deceased in his dying declaration and the testimony of Amarjit Singh, Mal Singh and Teja Singh PWs regarding the presence of these witnesses at or about the place of occurrence. On the top all this we find that the evidence of Ram Asra upon which reliance has been placed by the prosecution shows that Amarjit Singh, Mal Singh and Teja Singh were not there and had not witnessed the occurrence.

10. The other eyewitness, upon whose testimony reliance has been placed by the prosecution, is Ram Asra (PW 14). So far as this witness is concerned, we find that his presence at the scene of occurrence was not mentioned by Ajaib Singh deceased in the dying declaration which was recorded by ASI Harbhajan Singh at Khanna hospital. According to Ram Asra, he was working with the deceased at the well when the three accused came there and assaulted the deceased. If Ram Asra was, in fact, present and working with Ajaib Singh deceased at the time of the occurrence, it is not clear as to why the

deceased should fail to mention that fact in the dying declaration. The evidence of Amarjit Singh, Mal Singh and Teja Singh upon which also the prosecution placed reliance goes to show that Ram Asra had not witnessed the occurrence. The name of Ram Asra was in the very nature of things not mentioned in the first information report, because the said report was based upon the dying declaration of Ajaib Singh. It would thus appear that the eye-witness upon whose testimony the prosecution wants to sustain the conviction of the appellants is shown to be an unreliable witness by the other evidence produced by the prosecution. The present is a case wherein one set of prosecution evidence condemns the other set of evidence produced by the prosecution. The present is a case wherein one set of prosecution evidence condemns the other set of evidence produced by the prosecution. In the above state of affairs, we find it difficult to secure a firm ground upon which to base the conviction of the accused appellants."

When the accused No.1 has been asked more than one questions while recording his statement under section 313 of CrPC placing reliance on the evidence led by the prosecution as to diameter of bullet found from the body of the person deceased and the hit mark found on the trunk of the tree, even than the ld. Judge has simultaneously accepted that the evidence of FSL expert Mr. Modi who examined the bullet mark-F also helps the prosecution. It is clear that somebody has played with the muddamal bullet which was actually taken out during the post-mortem examination before it could reach for analysis to FSL or to Mr. Modi. When the prosecution has asked about the injury found on the person deceased i.e. injury No.10 which was of 0.5 cm, it could not have been linked with the crime which according to FSL, probably has been committed with the bullet having diameter of 0.775 cm. which corresponds to the muddamal Revolver of 0.32 Caliber. The prosecution can not ride on two horses of different size and that too at different directions and on this sole ground, the accused No.1 was required to be acquitted.

7. While developing the above arguments, ld. Sr.Counsel Mr. Thakkar has hammered that above two inconsistent circumstances examined juxta position, than the discrepancies found in the evidence as to sealing of the muddamal bullet does not reveal any minor infirmity or immaterial inconsistency, but a serious infirmity. On the contrary, the infirmity found in the evidence as to sealing of the muddamal bullet, assumes great importance and it is capable of raising serious doubt about the fact as to which bullet has killed the deceased viz. (a) a bullet of 0.5 cm taken out by the panel of doctors performing post-mortem from the body of the deceased and/or (b) a bullet having diameter of 0.775 cm which could be fired from a 0.32 Caliber Revolver. In the decision in the case of ***Datar Singh v/s State of Punjab, AIR 1974 SC 1193 ,*** on the set of facts available, the Apex Court has observed para-22 of the judgment thus:-

> “22. It seems to us that the High Court had assumed that th cartridges found in the gun were

actually of a kind which would not cause blackening or charring or singeing and that these were the very cartridges used by the murderer. The requirements of a technically proper proof were wanting on this point. The ballistic expert, called in as a defence witness, was not even questioned on the point."

This inconsistency in the evidence of the experts examined during the trial need to be appreciated in the background of one important aspect i.e. the infirmity found in the evidence because Dr. Bhise was not shown muddamal bullet mark-F physically and no question was put to Dr. Bhise that the entry wound which they noticed is possible by a bullet mark-F or not, no question was put to Dr.Bhise showing muddamal bullet-F by the ld. PP that whether that was the very bullet which was taken out by them while performing the post-mortem. During trial, at the instance of the wife of the deceased, more than one Spl.PP were appointed by the State Government and all of them have put their efforts to see that the Court is assisted with utmost

efficiency and diligence. So, the absurdity kept by not putting a positive question to Dr. Bhise by the ld. PP ought to have been considered fatal to the theory put by the prosecution. On the other hand, Mr. Modi, Forensic Science Expert was not in a position to state in his deposition when he was asked a pointed question in reference to Q.7 asked by the IO vide query raised in the forwarding letter exh.56. Q.7 in the document exh.56 reads thus:-

> "Q.7 Whether from the skin mark-I, bullet mark-F has passed through and whether any particles of bullet were present on the skin?

While answering this query, Mr. Modi has expressed his inability to express opinion whether the bullet mark-F could have passed through the sample skin mark-I. In para-9 of the deposition, during the course of cross-examination by the ld. Counsel appearing for accused No.1, this witness has deposed that he has not expressed any opinion in his report because he was not in a position to decide whether a bullet mark-F could pass through the entry wound found on the skin mark-I. In the same

way, Mr. Bhise has not identified the weapon used in commission of the offence with which the deceased is killed. The IO could have taken Revolver to Dr. Bhise or any of the three doctors who performed the post-mortem and collected opinion evidence. In absence of such set of evidence, the ld. Trial Judge ought to have held that there is no reliable and cogent evidence to show that with the muddamal Revolver and by using bullet mark-F, the deceased was killed. The ld. Trial Judge, on the contrary, has asked the question while examining the accused under section 313 of CrPC by putting both the inconsistent stands independently as if both exists simultaneously and independently. Mr. Thakkar has taken us through the relevant part of paras 2 & 3 of the decision of the Apex Court in the case of ***Datar Singh (supra)*** and especially pointing out relevant questions 5 & 6 out of the six questions referred to in the said judgment. We would like to reproduce questions Nos. 5 & 6 below:-

> (5) Whether the prosecution instead of the accused, had been given the benefit of doubt on various features of the case on which two

views were possible?

(6) Whether different standards of proof had been applied in judging the credibility of the defence evidence as compared with the prosecution evidence?

The Apex Court, in para-3 of the above-cited decision, as observed as under:-

> 3. It is often difficult for Courts of law to arrive at the real truth in criminal cases. The judicial process can only operate on the firm foundations of actual and credible evidence on record. Mere suspicion or suspicious circumstances cannot relieve the prosecution of its primary duty of proving its case against an accused person beyond reasonable doubt. Courts of justice cannot be swayed by sentiment or prejudice against a person accused of the very reprehensible crime of patricide. They cannot even act on some conviction that an accused person has committed a crime unless his offence is proved by satisfactory evidence of it on record. If the pieces of evidence on which the

prosecution chooses to rest its case are so brittle that they crumble when subjected to close and critical examination so that the whole superstructure built on such insecure foundations collapses, proof of some incriminating circumstances, which might have given support to merely defective evidence cannot avert a failure of the prosecution case.

8. According to ld. Counsel Mr. Thakkar, the ld. Trial Judge has ignored number of infirmities which had serious impact on the quality of evidence led by the prosecution and that has resulted into palpably wrong findings on facts. These infirmities, according to Mr. Thakkar, are:-

(a) The prosecution witness Bharatbhai and Rahulbhai consistently avoided giving correct answers or forthright answers through out their deposition even on basic facts which were bound to be there within their special knowledge;

(b) The prosecution witness PSI Bodar failed to

register an FIR at the earliest point of time though he admits of being aware of commission of a cognizable offence as the accused committed murder with a deadly weapon like revolver and though all the accused who allegedly committed the crime according to the complainant (this witness) were present before him and though he had gone to the hospital for the purpose of investigation of the crime;

(c) When the deceased Arvindbhai was already declared dead according to the prosecution on arrival at 4:00 O'clock, the intimation sent by PSI Bodar to Sarkhej Police Station through Police Constable Subtrahend Singh was to the effect that one man (without giving the name of Arvindbhai though his name was already disclosed to him) was brought in an injured condition in a firing. (He not only knew his name and failed to disclose, but he also knew that Arvindbhai was dead but he gave a false statement that the deceased was injured). Entry Ex.105 (at

Page 123 of paper book) which is taken from the Station Diary -Page 61, Entry No.12 (Ex.104) certified copy thereof) if seen in original, it bears erasers about signature of PSO, perhaps because this entry in the station diary was actually made after 7:15, more possibly after 8:00 but was anti-timed as having been received at 5:10 to show that the name of accused was disclosed at the earliest point of time. But if one looks the station diary of Sarkhej Police Station (Page 61), it would clearly appear that handwriting in the station diary of this particular entry is different. (Because another PSO made this entry and the signature of PSO has been scored off). It is admitted by the witness Stravinsky Vaghela that there is only one PSO on duty and his duty ended 12:00 O'clock noon to 7.15 in the night. Since this entry was possibly made after 7:15, the handwriting is different from other entry and the signature has been erased."

9. Mr. Thakkar has taken us through the various questions placed to PW 24 Stravinsky Timesharing Vaghela, PSO, Sarkhej (Exh.103) and has hammered that IO of Sarkhej Police Station has attempted to put an anti-time entry. Over-writings and insertion of the entry in different hand-writings would benefit the prosecution only. There is no scope to infer that the accused was interested in anti-time entry of FIR. The impression created by the answers given by important witnesses namely Bharatbhai and Rahulbhai during the course of cross-examination is that they are interested in avoiding answers to all relevant questions put to them and to most of the questions asked, they have responded by saying that “they do not know” or “they do not remember”, otherwise it was not impossible for these two witnesses jointly or individually to insist on registration of the complaint by Ellisbridge Police Station. The Ellisbridge Police could have registered the complaint giving “0” Number and much prior to the arrival of the police officer from Sarkhej Police Station.

10. Mr. Thakkar has seriously alleged that certain irregularities found in the evidence, if are collectively seen and considered, it creates an impression that somebody interested against the accused had probably changed the bullet and to strengthen the arguments as to the “change of bullet”, Mr. Thakkar has pointed out the infirmities in the evidence as to the sealing procedure of muddamal bullet mark-F viz;

(i) it is the prosecution case that Dr. Bhise while performing post-mortem in presence of two other doctors, took out the bullet mark-F which he gave to the police in a sealed condition. He has pointed out relevant noting made in the post-mortem note and the statement on oath made by him in his deposition (para-10). This material is the only material available and, therefore, it has been placed before the Court as to sealing of muddamal mark-F. There is no mention in the evidence of Dr. Bhise that what was the procedure followed for the purpose of sealing of muddamal mark-F. There is no evidence on drawing of Nanchang confirming the sealing procedure adopted

by the panel of doctors and/or by Dr.Bhise.

(ii) No Nanchang slip was available for muddamal mark-F since no Nanchang was drawn. No description of the seal was available because Dr. Bhise has not stated as to whether the seal fixed while sealing mark-F was the seal either of his hospital or the department or his personal seal. There is no evidence of convincing nature to show that the specimen seal was dispatched because Dr. Bhise has not stated so. Neither the investigating agency nor any other machinery has sent the specimen seal to FSL, nor either Dr. Bhise or any other prosecution witness including the IO has deposed to this effect.

(iii) There is material on record to show that no specimen seal was received with mark-F by FSL along with Evangelic Nonah. He has taken us through the relevant evidence Exh.51 & 52 in this regard and deposition of the witnesses concerned.

(iv) No questions were asked by the prosecution to the doctor as to whether as per the post-mortem report when five items were sealed, whether they were sealed in a separate individual sealed packets or whether they were the part of a single sealed packet. There is no evidence by Dr.Bhise that while adopting the sealing procedure, a Nanchang was drawn and he had also put his own signature and cross-signature of any individual person like pans

was obtained.

(v) He has not stated anything about affixing of monogram or personal seal as it was a wax seal.

(vi) Whether sealed packets were tied with any string and whether this string was sealed with any wax seal?

(vii) The person named Abid Hussain who carried muddamal mark-F allegedly in a sealed condition from the doctor to the police station, has not been examined otherwise it was possible for the prosecution to prove that the witness Abid Hussain has accepted the parcel or parcels in a sealed condition from the doctor and he had safely handed over all these articles in a sealed condition to either IO or to the police station Malkhana.

(viii) Referring exh.56 Ravanaghi Nondh- forwarding letter dated 24.02.2000, it is argued that on seeing the original, the moot question was required to be considered by the trial Court that whether it was possible for the expert to make any comment as to the scope of mischief that could have been played with hammer-striking pin because the investigating agency was with the possession of the muddamal Revolver seized and was produced on 23.02.2000. On that very day, all 10 muddamal articles mentioned in exh.56 were received by the FSL authority

and on microscopic comparison, it was found that some mischief has been played on the firing pin as well as the muzzle. There is no scope in this fact situation to infer that such mischief could have been played by the accused only. The authority could have mentioned the type of similarity and dis-similarity found when seen on the caps of the test bullets fired from the muddamal Revolver. In the present case, the police has not recovered any cap of used cartridges from the alleged place of incident and, therefore, this opinion can not be considered against the accused while evaluating the evidence and appreciating the conduct of the accused.

11. In the background of these submissions, Mr. Thakkar has taken us through the deposition of Dr. Modi (Exh.50). This witness has stated that he received from Sarkhej Police Station parcels in a sealed condition and the same were handed over to his superior Mr. Khandelwal, Asstt. Director. Mr. Khandelwal had put his signature in lieu of the receipt thereof. This witness has proved the signature of Mr. Khandelwal at Exh.51 & 52. Exh.51 is the letter addressed to PSI, Sarkhej Police Station, Ahmedabad (Rural) dated 25.02.2000 signed by Mr. Khandelwal and the said letter says that three sealed packets have been received from the Police Constable Mavjibhai Jivabhai, Buckle No.952. In the same way, exh.52 is the receipt dated 23.02.2000 signed by the very

same officer wherein he has said that he has received 10 sealed parcels from Sarkhej Police Station. Mr. Khandelwal, though available, has not been examined and Mr. Modi has proved the signature of Mr. Khandelwal and in absence of any positive evidence as to the contents of the letters exh.51 & 52, they can not be looked into and contents can not be said to have been proved and the Court should not either assume or presume that all the parcels viz. 3 + 10 were received in a sealed condition. The documents exh.51 & 52 are the printed formates and such printed formal assertion should not be given any weightage in absence of the evidence of Mr. Khandelwal, is the submission of Mr. Thakkar. It is further argued that the plain reading of these letters/receipts reveals that Mr. Khandelwal has not received any specimen seal. There is no evidence of convincing nature available on record to show that any specimen seal was ever sent to FSL by Sarkhej Police, though the same was the demand from FSL. In absence of receipt of specimen seal, it was not possible for Mr. Modi to say that the parcels received by FSL were in a sealed condition. When it is not possible to rule out the scope of tampering with the seals that were available/affixed on the parcels which in turn received by Mr. Modi especially when Mr. Khandelwal has not been examined and there is no evidence as to the receipt of specimen seal by FSL, the Court ought not to have given any weightage to this part of

evidence, is the submission of Mr. Thakkar.

12. Mr. Thakkar has further submitted that in the deposition of Mr. Modi, he has said that when he was examining bullet mark-"F", it was in a sealed condition, but he has not said anything that this seal was there on the parcel or how did he compare the said seal to assert that the same was intact. According to Mr. Thakkar, there is no material on record as to when i.e. on which date and time these parcels were received by Mr. Modi and they were found in a sealed condition, nor the date of examination of the parcels or the details as to the comparison of the seal with any specimen seal. Mr. Modi was not supposed to compare the seals. This fact was required to be proved by Mr. Khandelwal. Mr. Khandelwal only could have said that at the time of receipt of the parcels, he had compared the seals with the specimen seal received and the seals were intact. So, when there is no evidence to show that who compared the seals and/or whether any specimen seals were ever received by FSL or whether any attempt to compare the seal that was there on mark-"F", was made and the same was also compared with the specimen seal, the opinion of Mr. Modi, in these circumstances, would not carry the case of the prosecution any further. In the same way, absence of evidence as to who compared the seal on mark-"F" with specimen seal and on what date this comparison was done,

the oral version of Mr. Modi on this aspect should not be given any weightage.

13. Mr. Thakkar has further argued that the Court should see the documents exh.53, 54, 93, 94 & 95 together and it clearly appears therefrom that Mr. Modi has received only five parcels -articles and he has surprisingly stated on oath that he had received all the articles in a sealed condition and seals thereon were intact. When it is clear from the record that on 23.02.2000, certain articles were sent to Biology Department of FSL, how Mr. Modi could have seen these articles on 25.02.2000 or thereafter in a sealed condition? In the same way, Mr. Modi has not stated anything in a convincing way that the seals were compared by him or in his presence by any other person. Even the report does not say that the seals were compared and on comparison they were found intact. One must say specifically that the same seal was there on the articles/parcels received for examination/test.

14(i) In support of his arguments advanced by Mr. Thakkar as to the infirmities as above, Mr. Thakkar has placed reliance on the decision of this Court in the case of **Jitendra @ Sanjaykumar Suryakant Desai v/s State of Gujarat (Criminal Appeal No.323/1996 Decided on 17.08.2001, Coram: BC Patel & AL Dave, JJ)** and two other

decisions viz. (i) **Ganpatram Bisnoi (Criminal Appeal No.287/1999, Coram: KR Vyas & RR Tripathi,JJ),** (ii) **Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas v/s State of Gujarat, 2006(1) GLH 409.** For the sake of convenience, we would like to reproduce the relevant part of the first judgment ***i.e. Criminal Appeal No.323/1996 (Supra)***, wherein the Court was dealing with the case under the NDPS Act:-

> 5. We have taken a close look at the record and proceedings. In our opinion, the contention regarding laxity in following the procedure relating to sealing of the seized contraband articles has some substance. It is very clear from the evidence of the Investigating Officer, P.S.I.-Ramgadhiya (Ex.55), Dy.S.P., A.T.S.Kantilal Modi (Ex.60) and Panch-Pareshbhai Tribhovandas Brahmbhatt (Ex.9) that, after drawing the samples, at the time of sealing the samples as well as the remainder of the contraband seized, the slips containing signatures of the Panch witnesses and the Police Officer were placed inside the bags, thereafter the bags were stitched and wax seals were applied. There is no dispute that the Seal remains in custody of the police. The possibility of

tampering with the muddamal at a later stage and then again resealing the same by the Investigating Agency cannot be ruled out. The very purpose behind carrying out the search, taking of sample and sealing in presence of Panch witnesses is to ensure that there is no scope for any mischief in procedure required to be followed. At the time of sealing, slips containing signatures of Panch witnesses as well as the Investigating Officer are affixed on the articles seized and a seal is applied over it, so that, in case of any attempt for tampering with the article seized, the seal would be broken or the slip would be torn which would immediately reveal such an attempt. If the slip is put inside as was done here, as discussed earlier, the possibility of tampering cannot be ruled out. Under the circumstances, the procedure followed for sealing in the instant case cannot be said to be proper and free from any possibility of tempering. The procedure, therefore, cannot be said to be beyond the scope of any reasonable doubt and in that event, benefit must go to the accused.

5.1 This point was raised before the learned Trial Judge by the learned Advocate for the

accused-present appellant. The learned Trial Judge has expressed his agreement that the slips must be affixed beneath the wax seal which is not done, but declined to accept the contention on the ground that there is no evidence to indicate any tampering with the muddamal article. In our view, in the facts of the present case, it was not proper to expect the defence to prove any tampering. A circumstance indicating a reasonable doubt or suspicion is required to be indicated which, in the instant case, in our opinion, is reflected from the evidence on record. The Investigating Agency has not followed the procedure properly and the benefit, therefore, must go to the accused-appellant.

Subsequent decisions are based on the same ratio and those cases are also under the NDPS Act and we do not see any need to discuss the ratio of the subsequent two decisions.

(ii) One more decision of this Court cited by Mr. Thakkar is also of a case under the NDPS Act. In the case of **Chandrakant Nagindas Modi v/s State of Gujarat, 1989 EFR 409,** the Court has observed thus:

" On verifying the slip, it appears that it was

not affixed on the packet contained in the muddamal either by gum or a sealing wax.If it would have been properly affixed, it could not have been taken out intact. It, therefore, appears that the muddamal was not properly sealed and there was all the possibility of substituting the substance. Coupled with this, the fact that the muddamal remained with police for more than two months, raises a doubt."

In the cited decision, 10 pellets of Charas were recovered. When the accused was getting down from an auto-rickshaw in the city of Surat (Nanpura area), he was intercepted and the muddamal pellets of charas were recovered and the same were placed in a Khakhi cover and slip bearing the signatures of both the panchas was placed on it and packet was tied with thread and thereafter it was sealed by the sealing wax.So, under these circumstances, the Court decided to acquit the accused.

(iii) The gist of the arguments of Mr. Thakkar on this point is that in the present case, no full-proof evidence has been led by the prosecution capable of ruling out the scope of tampering with the articles inside the so-called sealed articles received by the FSL and, therefore, no weightage should be given to the evidence of the expert which ultimately is an opinion

evidence.

15. Certain infirmities have been highlighted by Mr. Thakkar and it is submitted that they are conflicting and the nature of infirmities takes the case of the prosecution under the thick shadow of doubt. While developing this argument, Mr. Thakkar has focused on the following aspects:-

(a) There is substantive change in the diameter of the bullet;

(b) There is material difference in lend & groove of the bullet;

(c) When the bullet was handed over by the doctor in a sealed condition, how the police would come to know about the Bore of the bullet because in the document exh.56- forwarding note sent by the Director of FSL, Ahmedabad, the police has mentioned the Bore of the bullet. At Sr.No.6, it is mentioned that a bullet of 0.32 Bore is being sent in a sealed packet which was taken out from the body of the person deceased during the performance of the post-mortem and received by the police through Police Constable Abid Hussain i.e. the bullet mark “F”. It is alleged that as the police had recovered muddamal Revolver of 0.32 Bore (Caliber) along with three

used cartridges (bullet caps) and 17 live cartridges of the same Bore i.e. KF 0.32 Bore, the police replaced the bullet because Dr. Bhise has never taken out the bullet of the size which could have been loaded and fired from 0.32 Bore Revolver.

(d) Dr. Bhise has said that total five articles were handed over to police and it is the case of the prosecution that the cloths of the deceased were sealed by the police. On one hand, the doctor has said that he had handed over all the articles in a sealed condition, then how and why the seal placed by the doctor over the cloths of the deceased was removed and the cloths were again sealed. How the cloths of the deceased could bear the seal of the police? This raises doubt as to the misuse of the seal used by the doctor.

(e) In absence of evidence from the expert of FSL that the FSL authority had received the specimen seals, the evidence led by the prosecution vide exh.51 & 52 can not be given any weightage.

(f) Visual disparity in the description of the bullet mark-”F” is apparent from the evidence of FSL expert in comparison with the post-mortem notes of doctor and so the trial Court ought not to have held

that the prosecution has satisfactorily proved that the deceased has been killed by the bullet injury fired from the licensed Revolver of 0.32 Bore. While making this submission, Mr. Thakkar has taken us through the relevant pages 551 to 556 of the paper-book and the contents of page Nos. 709 & 718 of the paper-book.

(g) The muddamal bullet forwarded by the police to FSL expert is referred in the panchanama exh.44. The panchanama shows that the panchas were called for the purpose of drawing panchanama of the cloths of the deceased only. The panchas were never told that something more than the cloths of the deceased is also required to be recovered formally under the said panchanama. The panchanama exh.44 was supposed to be for four items and at the end of the panchanama, it is also stated that no other item is included. However, it is strangely mentioned in the very panchanama that the 5th article bullet was also recovered. The insertion of the fifth article in the panchanama suggests the interpolation. Panchanama exh.44 refers cloths which were forwarded under the seal of VS Hospital, is the say of the doctor. So, it is legitimately inferable that the seal of VS Hospital must have been removed once by the police. The document exh.94 clearly indicates that there was

no formal panchanama for the recovery of the bullet mark-”F”. Then how this article has been reflected in the panchanama exh.44, is the question and the same is not satisfactorily replied.

(h) The Medical Officer forwarded five items to the police, then why only two of them are referred in the panchanama exh.44? This question is also not answered properly by the prosecution.

(i) The bullet mark-”F” must have been sealed by the hospital doctor and police both. The police could have put its seal, however if the bullet was genuinely recovered under the panchanama exh.44. Bullet mark-”F” was sealed in a card-box with white adhesive tap. It is very easy to refix or re-affix the adhesive tap on the same box without disturbing the original seal.

(j) It was not possible for the police to describe the diameter or about the lends & grooves of the bullet lying in the sealed card-box because as per Dr. Bhise, the bullet was of 1.05 cms. Diameter and the bullet taken out by the FSL was found of 0.77 c.m. Diameter. The bullet sent by the doctor was having circular groove on the lower part of the bullet whereas the bullet received by FSL does not

have any such groove and, therefore, it requires to be held that the bullet examined by the FSL expert is quite different than the bullet taken out from the body of the person deceased.

(k) Non-identification of the bullet by Dr. Bhise and Mr. Modi, FSL Expert in the Court takes the case of the prosecution under much darker shadow of doubt.

(l) There is confusion in the worksheet of the expert of FSL i.e. exh.94. The FSL expert has not even cared to take out the photographs of the bullet received by him. Such photographs ought to have been taken and produced during the course of trial.

(m) Inability to express opinion by FSL expert that both the bullets are having similar characteristics or the muddamal bullets could have passed through the hole that was found on the Zabbha put on by the deceased and the muddamal skin mark-”I”, makes the opinion evidence useless.

(o) That the trial Court has not even asked any question to the convict accused in the context of the opinion evidence and has not even cared to discuss the procedural infirmities emerging from the

evidence of the police witness.

(p) That in the present case, according to Mr. Thakkar, the complainant had actively participated in the conduction of the trial. More than one special prosecutors have appeared and this is a case where about 28 witnesses have been examined and some of them were also recalled by the trial Court and the prosecution has also attempted to fill up the lacuna or to insert new things which the witnesses recalled could have said when they were examined by the trial Court. When the prosecution witnesses themselves have attempted to put curtain on the sequence of events and the name of the accused was not disclosed immediately to the police, then the trial court ought not to have linked the accused with the crime especially when three persons, as alleged by the prosecution, were present on the spot of incident. Whether any of the other two accused were having a fire arm from which 0.5 c.m. bullet i.e. 0.22 Bore fire arm has been fired, was required to be investigated thoroughly especially when the police was already having the opinion expressed by the panel of doctors and the post-mortem note was available with police. The prosecution has not even successfully proved the place of offence. When the trunk of the tree was

having a bullet mark of the size that could have been fired from 0.22 Bore fire-arm, then the Investigating Officer ought to have investigated thoroughly as to the actual weapon used in the entire incident and this infirmity should be considered in the background of the conflicting opinion evidence led by Dr. Bhise and Mr. Modi from FSL. For short, the prosecution has failed in proving the guilt beyond doubt and finding of the conviction recorded by the trial Court being erroneous should be quashed and set aside and this Court should acquit the accused.

16. While placing the above points, Mr. Thakkar has cited about 39 judgments. These authorities can be divided under the following heads:-

(I) authorities in reference to FIR (Sec.154 of CrPC)

(II) authorities qua sections 25 & 26 of the Evidence Act.

(III)Circumstantial evidence.

(iv) in reference to the scheme of section 164 of CrPC;

(v) identification of the muddamal.

(vi) sealing of muddamal.

(vii)measurement of bullet.

(viii)when two sets of evidence have been pressed into service by the prosecution.

(ix) section 313 of CrPC;

over and above the authorities cited on the above aspects, Mr.Thakkar has placed reliance on the decision reported in;-

(a) 2005(9) SCC 331;

(b) 2005(5) SCC 91;

(c) 2005(2) SCC 489;

(d) 2005(2) SCC 42

(e) 1976(3) SCC 834;

On the point of ratio of the cases cited and scope vis-a-vis its applicability to the case on hand, Mr. Thakkar has taken us through the relevant pars of the above-cited decisions. The Court has been provided with bunch of zerox copies of the above cited authorities by ld. Counsel Mr. Thakkar. In most of the cited decision, the Apex Court as well as the High Courts have propounded the ratio or has referred the settled legal position qua the facts of the respective cases that were there before the court concerned.

17. According to ld. APP Mr. KT Dave, the prosecution

has satisfactorily established the charge beyond reasonable doubt against the convict accused. When the ld. APP Mr. Dave was canvassing his arguments, he has fairly accepted that considering the settled legal position in reference to the appeal against the acquittal preferred by the State, it would be difficult for the State to convince the Court that the finding of acquittal recorded qua other two accused persons is perverse or patently illegal and the acquittal of accused Nos. 2 & 3 can be effectively reversed. The infirmities in the evidence qua accused Nos. 2 & 3 and the lacunas left by the investigating agency perhaps has resulted into the acquittal of these two accused persons. Some more efforts on the part of the investigating agency could have successfully brought home the charge against all the three accused and, therefore, his arguments should be considered in the perspective of the charge levelled against the convict accused No.1 Amrutlbhai.

(i) The first point advanced by ld. APP Mr. Dave is that the muddamal Revolver is the licensed weapon owned by accused NO.1. There is ample evidence to prove this aspect including the documentary evidence and accused No.1 has not disputed that he is the owner of the muddamal Revolver. It is the say of the accused that it was handled or carried by any other person of his family under the permission granted by the licensing authority.

Unless otherwise proved or appropriately explained to the satisfaction of the Court, a legitimate inference can be drawn that accused No.1 and accused No.1 only was possessing and must be possessing the muddamal Revolver and none-else.

(ii) The FSL expert has opined that the muddamal Revolver on examination was found to have been fired/used. Mr. Dave has taken us through the relevant part of the opinion which was there on record vide exh.95. Till the date of recovery, this Revolver was supposed to be in possession and control of accused No.1 and if it is found that fire pin and/or muzzle were tampered and somebody has played the mischief on these two parts, then the Court can say that the convict accused only had an opportunity to play this mischief or to permit somebody to play this mischief. Why one should play mischief on these two important parts of a valuable Revolver and what should be the purpose? It is specifically said by the expert while examining the muddamal Revolver article mark-”J” that the barrel was taken in the laboratory before using it for test fire and the laboratory was able to detect the particles of gun powder- nitrate and lid. There is no confusion in the date of sending of muddamal and receipt of it by FSL expert. The document exh.52 is the receipt sent and signed by the authority, who had received the muddamal and the date reflected in

exh.53 & 54 of 17.03.2000 states the date of forwarding of the opinion to Sr.Police Inspector, Sarkhej Police Station. When it is there in the evidence that Revolver mark-”J” was sealed at the time of recovery and it had reached to the FSL laboratory in a sealed condition, there is no scope to allege against the investigating agency qua the mischief played on the above two parts i.e. on fire pin and muzzle. The forwarding letter dated 17.03.2000 states that muddamal parcel-”J” i.e. sealed parcel containing Revolver, was bearing seal of Sarkhej Police Station Sub Inspector and the seals were found intact. In the same way, 17 cartridges along with three caps of used cartridges mark K-1, K-2 and K-3 were received in a sealed condition by the FSL. Before expressing opinion on the point of mischief played on the firing pin and muzzle, Mr. Modi has examined K-1, K-2 and K-3 and they were compared with the used cartridges on test fire and because of the mischief played on the fire pin, he could not compare mark K-1, K-2 and K-3 with 11 test fire cartridges. When the expert had successfully test-fired 11 cartridges, it can be said that even after the mischief played, Revolver was usable. When it is argued that one may have used his licensed weapon at any time prior to the incident in question, even then, the wash of the barrel may show the presence of nitrate and lid etc. The accused is supposed to maintain account details as to the ammunition purchased and kept by him.

Three used cartridges have been recovered by the police during investigation i.e. K-1, K-2 and K-3. It is true that the accused is not supposed to say anything and the prosecution could have collected such evidence, but the fact remains that at least three live cartridges were used or must have been used by the accused. It is neither the defence nor it is argued that mark K-1, K-2 and K-3 do not belong to the accused and they have been introduced falsely to strengthen the case against the accused by the investigating agency. When it is said that firing pin marks and other marks could not be compared because of the mischief played on the fire pin and muzzle so as to lead to any negative or positive conclusion, the Court should draw an inference against the accused that one bullet i.e. mark-"F" bullet may be the bullet part of the cartridge either mark K-1 or K-2 or K-3 and before the police could recover the muddamal Revolver mark-"J", either accused or the person interested in the result of the case had played mischief with the fire pin and muzzle. This is an important circumstantial evidence against the accused and his conduct.

(iii) The muddamal bullet mark "F" is the bullet recovered from the body of the deceased, is the case of the prosecution. Though this allegation has been seriously assailed by the defence side, but the Court should read, according to ld. APP Mr. Dave, the oral

evidence of Dr. Bhise in reference to the recovery of the bullet from the body, the place in which it was found in the body of the person deceased at the time of the performance of the post-mortem and its sealing by the panel of the Doctor who performed the post-mortem. It is the say of Dr. Bhise that a bullet was taken out from the body and it is one of the articles which was sealed by putting it in a card-box and along with other muddamal articles taken out by them including the cloths of the deceased , were handed over to the police constable. In this background, when it is opined by the FSL that the very sealed box was sent to FSL by police without making any addition or alteration qua the seal placed by the hospital authority, the measurement of the bullet mentioned in the post-mortem note would not matter if found different. According to Mr. Dave, there may be many reasons when the bullet recovered from the body was sealed by the doctor who can be said to be an independent person and group of the doctors not interested in the result of the case and the seal of the hospital was affixed on the box, there was no scope for anybody to play mischief with the sealed box that could not be even noticed or ascertained by the FSL experts who are equipped with the latest scientific items including the microscope. There is cogent evidence that the sealed box was one of the articles given to the police by the hospital authority and they were forwarded to FSL.

According to Mr. Dave, it is opined by the expert that the bullet mark-"F" could have been fired from the muddamal weapon. There is no explanation as to the use of gun on earlier occasion by the accused. The licence of the weapon is in the name of the accused No.1, is an admitted document. It is true that fist time when house of the accused was searched, the police could not recover the muddamal Revolver. The police thereafter effected recovery of muddamal weapon through the wife of the accused. According to Mr. Dave, the weapon which was not there in the house nor with the accused initially, how it reached to the wife of the accused, is the question. The relations between the person accused and person from whom the weapon has been recovered, should not be ignored. How weapon reached the house of the accused so that wife of the accused can hand over the same to investigating agency, is also a question. Missing of the weapon for some period, on the contrary, strengthens the case of the prosecution that somebody who was interested in the defence of the accused, has played the mischief with the most sensitive parts of the valuable Revolver. Mr. Dave has pointed out the facts stated by Mr Bhise in para-10 of his deposition as well as the details of parcels mark 4 & 5 referred to by him. The original seal on the samples are shown with details as document exh.94 and the FSL had received the parcels as per the seal described in the document exh.94. The cloths of the deceased were

kept separate. It might have been kept separate for convenience because normally the cloths would be sent for biological examination. Some of the articles were to be examined by the ballistic and/or physical expert. The Court should consider that when two independent experts give two different dimensions to one bullet, than which description as to dimension should be accepted is the question. The diameter and measurement shown by the panel of doctors in the post-mortem notes does not tally with the description and measurements found by FSL expert Mr. Modi. Panchanama exh.44 reveals that the cloths that were there on the body of the deceased must have been sealed by the police otherwise there could not have been any detailed description of all the three cloths that were on the body of the deceased, and the bed sheet. The panchanama of recovery Exh.44 says that four articles were kept in a different cloth bags and they were stitched and sealed by affixing the slip signed by the panchas. It is true that there is addition in the panchanama, but it does not go against the prosecution. On the contrary, this addition should be considered favourable situation to the prosecution because it is not the say of the prosecution that the bullet was ever sealed by Sarkhej Police. The officer who sealed four articles mentioned in the panchanama, instead of adding one article at Sr.No.5 could have retained that fifth article. However, the said article is shown to the

panchas which is in a sealed condition. Article mark “F” bullet as was not sealed while drawing panchanama qua other four articles, the officer has retained that four articles which are sealed and seized in presence of the panchas. True it is that a reference of mark-”F” bullet in panchanama exh.54 appears to be an addition in the list of articles shown, but it is mentioned clearly at Sr.No.5 in the list of the articles seized as “one sealed packet containing bullet of value Rs.00.00”. It is further mentioned that four articles are kept in different cloth bags and they are stitched and sealed. Merely because it is mentioned that nothing else than four articles have been seized, would not make the availability of muddamal bullet mark -”F” with the police which was handed over by the hospital authorities to the police, doubtful. That mistake appears to have been committed by PI, Sarkhej Police Station Mr. Mer. It was not impossible for him to draw even a separate panchanama of seizure of a sealed packet containing the bullet mark-”F” with the same set of panchas. Thus, there is sufficient evidence on record to show that the parcel containing bullet mark-”F” was forwarded to FSL bearing seal of the department of Forensic Medicine, VS Hospital, Ahmedabad. The FSL experts were supposed to compare the seals with the seal that was there on muddamal sample parcel. It is said by the expert that it was found intact and sealed. The opinion of the FSL expert, therefore, can

be effectively used for holding that the muddamal bullet recovered from the body of the deceased during the post-mortem is the bullet that could have been fired from the muddamal Revolver. The technical arguments advanced commenting on addition of one article under the panchanama exh.44 or description given by the doctor as to the bullet including the measurements, are not sufficient to raise any shadow of doubt. On the contrary, according to Mr. Dave, some over-doing is there on the part of the panel of doctors and there may be any reason for such over-doing otherwise the doctors were not supposed to mention their observations as to the number of lends and grooves. Whether they were having right-hand twist or otherwise, was not the subject matter on which the doctors could have opined.

(iv) It is argued that the lacuna left of not showing the muddamal bullet mark-"F" to Dr.Bhise by the ld. PP is an important mistake, but the Court should think that whether this mistake affects adversely to the strength of the prosecution or not and according to ld.APP Mr. Dave, this mistake does not affect adversely. Unless the Court accepts that the investigating agency was able to play with the sealed box/packet and to replace the bullet, confusion cropped up as to the measurement of bullet would not be given any weightage. If the bullet taken out from the body was of the measurement mentioned in the

post-mortem note and of the type that could have been fired from 0.22 Bore weapon, then why FSL Medicine Department would help the police in replacing the bullet? Undisputedly, three used cartridges have been recovered in the present case during investigation and, therefore only, the FSL experts were able to note that somebody has played with the fire pin of the muddamal Revolver. During investigation, the first attempt to recover the weapon from the house had failed. By that time, the muddamal bullet mark-”F” which was taken out from the body of the deceased, was already sealed by the panel of doctors. So, unless there is any tampering appears to have been made with the sealed parcel, the Court should not give any weightage to the details shown in the post-mortem notes as to the measurement of bullet because that was nothing but an overdoing by the doctor. After all, it is in the nature of opinion based on the facts collected by the panel of the doctors as to taking of measurement of the said bullet and after reading para-10 of the deposition of Dr.Bhise, Mr. Dave has placed heavy reliance on the dispatch note and the description. According to Mr. Dave, when two experts who can be said to be independent, gives two different dimensions of one muddamal article, than the opinion of the expert who is expert on the subject and equipped with more scientific instruments should be believed, especially when there is sufficient evidence to show that the bullet which was

taken out during the post-mortem examination was sealed by the panel of doctors and the same sealed parcel was sent to FSL for analysis. According to Mr. Dave, there is no strength in the arguments advanced by Mr. Thakkar that on the date of dispatch of mark-"F" bullet to the FSL, the police was aware bout the type of the weapon which the accused was holding under a licence and, therefore only, it was mentioned in the dispatch note that the bullet is of 0.32 Bore. When the opinion as to the recovery of 0.22 Bore bullet was there with the police, then why the police mentioned the size of the bullet as 0.32 Bore, is the question raised by Mr. Thakkar.It is argued that mere description is given in the dispatch note and it is not sufficient to raise doubt or to infer on conjecture that the police had already replaced the bullet prior to the preparation of the dispatch note. It was not impossible for the police to mention the size of the bullet on experience or otherwise considering the weight of a small parcel containing the weapon. No suggestion has been made either to FSL expert or to Dr. Bhise as to the scope of the replacement of bullet. Unless the entire panel of doctors supports the police, it was not possible to replace the seal of the bullet part.It is not correct to say that FSL expert was not made available with the specimen seal and, therefore, there was no scope to compare the seal. No direct question has been asked to FSL that even after demand,

the FSL was not provided with the seal. As such, there was no such demand sent by the FSL, is the say of the ld. APP Mr. Dave. Exh.55 clearly shows that specimen seal was sent stating as seal of Sarkhej Police station and in the same way, in exh.56, there is clear mention of sending the specimen seal.On document received in evidence during the course of the cross-examination of a witness where it is mentioned that the parcel mark-”F” was received with seal as per specimen and seal is also described by drawing the same, it would not be proper for the Court to accept that the bullet was taken for analysis without comparing the seal or in absence of specimen seal. There was no need to comply with the demand because specimen seals were already sent. The words relied on by Mr. Thakkar are nothing but a part of the printed format and in such a situation, there was no need for FSL authorities to send a reminder for such specimen seal. When the prosecution is able to prove satisfactorily that the bullet examined by FSL expert is the very bullet that was taken out from the body of the person deceased during the post-mortem examination, it is not necessary to show that bullet to the expert. No photographs were taken of the muddamal bullet by the FSL expert, but placing reliance on the observations made by the Apex Court in the case of **Ramnathan v/s The State of Tamil Nadu, AIR 1978 SC 1204,** it is submitted that no adverse inference should be drawn either against the expert or against the

strength of the case of the prosecution.

(v) While replying on the point as to the various infirmities pointed out by Mr. Thakkar in investigation, it is submitted by ld. APP Mr. Dave that this is a case of loose investigation. It appears that some infirmities have been left and some have cropped up because of the mistakes committed inadvertently. Initial errors have been committed by the Ellisbridge Police and some errors have been committed by the Sarkhej Police, but this Court should not give any weightage to the argument that the accused has been falsely implicated by delay in disclosure of the name. On 5.10 p.m., the name was disclosed. It can not be said to be a delayed disclosure. It is in evidence of the wife of the deceased that before she reached Prerana Hospital where the deceased was taken, the accused were already present there. It is also in evidence that the convict accused was in some other room and from where he was taken to Karnavati Hospital. In this fact situation, merely because some delay was caused by Ellisbridge Police in conveying the Sarkhej Police about the basic details of the offence committed, would not make the case of the prosecution doubtful on the ground that the name of the convict accused was not disclosed immediately and there was a scope to implicate the accused falsely. Referring the documents exh.104 & 107, it is submitted that on 16.15 hours, PW

Mahendrakumar of Ellisbridge Police Station had intimated Sarkhej police about the incident of firing in Shantivan Farm and Sarkhej police was informed to inquire into the matter. Thereafter, at about 17.10 hours i.e. at 5.10 p.m., PSI Mr. Bodar had given one intimation to Ahmedabad (Rural) Police Control and it emerges that City Police Control gave information that “one Amrutlal Bholidas Patel (convict accused) for some reasons by using the weapon like Revolver, had caused injuries to his son Arvind Amrutlal aged about 37 years and on account of that injury, he was taken for treatment at Doctor House, Parimal Garden Railway Crossing in Prerana Hospital and the doctor on duty has declared him dead and, therefore, immediate action be taken.” It is submitted by Mr. Dave that the Court should see the original document because this entry as alleged by the defence side, is ante-time. So, the entry should be read and appreciated in reference to the context of other evidence and entries posted earlier and subsequent to the entry No.56/2000 posted on 17.10 hours.

(vi) On the point of motive, it is argued that the prosecution is not supposed to prove the motive or a strong motive merely because the father is alleged to have been involved in a murder of his real son. It is true that there is heavy evidence as to motive, but the version of Artiben, w/o the deceased, should not be

ignored and thrown out on the point of motive as a weak piece of evidence. Referring the scheme of section 6, it is argued that some part of evidence of PW 26 Artiben can be considered because she refers about the dispute in reference to a wall. Even the words uttered by the deceased husband during the conversation with her very day and prior to some hours of incident is not considered as statement not falling in the scheme of section 32 of the Evidence Act because in the scene of offence panchanama, there are signs to show that some attempt was made to erect the wall in Shantivan Farm. It is argued that the say of PW Artiben and the signs of such attempt should be considered in the background of the measurements of the total agricultural land and division of the property that probably had notionally or actually had taken place. The evidence of Artiben as well as her father and brother reveals that distribution of the precious and valuable property in the city of Ahmedabad and in the periphery had resulted into the family dispute. The accused father i.e. the convict accused during his life time had divided one parcel of the land known as Shantivan Farm and one portion of it was given to the accused. This, according to Mr. Dave, is sufficient to prove at least the scope of quarrel amongst the family members and the owners of the property.

(vii)Mr. Dave has placed reliance on the observations

made by the Apex Court in the case of **State of Punjab v/s Bhura Singh, AIR 1985 SC 769** and according to Mr. Dave, the observations help the case of the prosecution where the Apex Court has said thus:-

> "3. The implication of these circumstances may now be spelled out. Since each of the guns used in the commission of the crime was a licensed gun belonging to each of the respective respondents, the possibility of the weapon having been planted was altogether excluded. The respondents have not explained under what circumstances the licensed guns belonging to them which in the normal course were expected to be in their possession, came to be fired recently. So also they have altogether failed to explain as to under what circumstances the cartridges came to be fired from each of the three guns so that the empties were found from the scene of offence. In other words, they have not explained how the fire arms which were their ownership and expected to be in their possession came to be used in the commission of the murder. The owner of a licensed gun would normally keep it in a secure place so that it is not used by unauthorised persons and so that no mishap occurs on account of an accidental firing of the gun. Even if the gun is

accessible, the cartridges would not be accessible and the place where the cartridges are kept would ordinarily be known only to the license-holder. .... The High Court appears to have accepted their evidence as regards their presence at the time of the occurrence. However, the High Court felt that the occurrence may have taken place in a different manner inasmuch as the evidence of D.W. 1 disclosed that there were some pallet marks on the outer wall and inside of the house of respondent Bhura Singh. Now, in the first place, it is not known whether these marks were recent ones. The respondents themselves do not say how these marks came into existence and whether they had any connection with the occurrence. These marks naturally could not be explained by the witnesses. That is no good ground to doubt or disbelieve their evidence. And this circumstance does not impair the total effect of their evidence buttressed by the aforesaid circumstantial evidence. In the facts and circumstances of the case the finding of guilt recorded by the Sessions Court was virtually unassailable and the High Court could not have by any process of ratiocination, reversed it. There is, therefore, no option but to allow the appeal and reverse and st aside the order of acquittal rendered

by the High Court.”

In the post-mortem note, nine injuries were found on the body of the person deceased over and above the fatal injury caused by the bullet. There is evidence on record to show that the hostile witness PW-1 Gulamanabi exh.41 also had sustained injuries in the incident and he was sent for medical examination. So, the investigating agency has not planted him as witness. He was an employee of the deceased. However, he has not supported the case of the prosecution. It is surprising that none of the accused were sent for medical examination, but it is in evidence that the deceased was brought in the hospital by a group of persons and all the three who brought the deceased at Prerana Hospital, have been arraigned as accused after investigation. Self-defence is not a plea taken by the accused nor it is emerging from the record otherwise some injuries on the body of the person accused could have helped the accused. Bullet marks found on the trunk of the tree indicates occurrence of incident, but no bullet has been recovered either by the police or by FSL expert. It is not the say of the accused that any of these three accused is holding valid licence to carry a pistol through which 0.22 Bore bullet can be fired. The say of PW Artiben should not be discarded whereby she has said that her deceased husband had left for Shantivan Farm. The actual conversation that has taken place between Artiben and the deceased even if is considered

to be inadmissible, but knowledge acquired by Artiben about the place for which her husband had left the house, should not be ignored.

(viii) The prosecution could have proved number of things by confronting three witnesses and mainly one police officer as well as PW-1 Gulamanabi on the strength of the statement recorded under section 313 of CrPC. But the ld. JMFC who had recorded the statements of three witnesses under section 164 of CrPC, the said witnesses could not be examined as he had left India for USA. The original statement normally remains with the recorder. At least, the Court should have issued notice against the hostile witnesses for giving false evidence in the event of proof as to the genuineness of the statement recorded under section 164 of CrPC by the ld. JMFC. Prior to the closing of evidence of the prosecution, the defence side had admitted the licence of the muddamal weapon and it has been given exh.127. Mr. Dave has drawn our attention to the document exh.128 tendered in the Court on 26.08.2002. Prior to that, the licence was accepted in evidence on admission (pursis exh.121 dated 12.08.2002). The accused person were examined by the Court. Thereafter, number of adjournments were sought by accused No.1. Attempts to get the matter transferred was also made from the defence side from one Court to the other. At the instance of the accused and the orders passed by this Court in other proceedings arising out of

supplementary proceedings that had taken place during the trial, the witnesses were recalled.

18. The ld. Sr.Counsel Mr. Thakkar has criticized the attempts made by the prosecution to re-call the witnesses and on the other hand, Mr. Dave has criticized the defence side for placing certain facts to the witnesses which can be considered to be an after-thought. We have taken care of this controversy in the later part of this judgment. In reply, Mr. Thakkar has submitted that the ratio of the decision cited by Mr. Dave would not help the prosecution and when there is nothing on record to show that muddamal Revolver was used very recently or was used in the recent past and there is no evidence on record to show that the convict accused normally carries his fire-arm with him and when no positive question under section 313 of CrPC has been asked in reference to the recovery of the weapon from his conscious possession, the convict accused should be acquitted. It is also argued by Mr. Thakkar that the accused is an old man and a sick person suffering from Psoriasis. Therefore only, he was granted some benefit by the trial Court and temporary bail was granted to him. According to Mr. Thakkar, the prosecution ought to have clarified the confusion which is there on record on the point of sealing of muddamal article and especially the muddamal bullet mark-”F”. Use of adhesive tape before the sealing mark-”F” bullet had made the entire parcel vulnerable from tampering point of

view. Inability to answer the question by the expert whether the muddamal bullet would pass through the skin sent for the test, tilts the balance in favour of the accused. The bullet was much within the body. So, it must have been fired from close range otherwise the wound would have been a bigger one. The time of death is also doubtful because the death, according to the Doctor, has taken place about 4 hours after taking meal by the deceased. Effect of this opinion would be that the deceased must be alive up to about 5.00 p.m. There are no rules or procedure prescribed in sealing the muddamal articles collected by the doctor before they are handed over to the police and in the present case, this may result into serious prejudice to the accused. But according to Mr. Dave, the law laid down by the Apex Court and this Court in reference to the sealing of muddamal articles seized during the course of investigation would not apply to the articles collected from the dead body because it is not a seizure in the eyes of law. So, no law of recovery or seizure would apply that has been relied on by Mr. Thakkar. The effective sealing is the only requirement. When a tampering either with seal or with muddamal is alleged, than the probable stage when this scope is there has been demonstrated directly or indirectly by the defence side. The evidence as to sealing of muddamal articles is of cogent and convincing in nature when it is not the say of

the convict that he also possesses some other arm or it is his say that any of the members of his family possesses any fire arm. In absence of some solid foundation, one should not stretch the logic to carve out imaginary innocence. He has submitted that this Court should consider the observations made by the Apex Court in the case of **Mani Ram v/s State of Rajasthan, AIR 1993 SC 2453 (p.2457).**

19. We have carefully considered the above submissions and all relevant part of oral as well as documentary evidence led during the course of trial and the question placed by the prosecutor as well as the defence counsel after re-calling of the witness and other aspects like the nature of infirmities and its effect pointed out to us. Without referring the entire set of decisions cited by Mr. Thakkar as well as Mr. Dave, we have decided to deal with the principles laid down in the cited decisions while evaluating the case of the prosecution. It is not necessary for us to mention the settled legal position in reference to the powers of the Appellate Court under section 374 of CrPC. When it is submitted before us by the convict accused that he being a rich man, the ld. Trial Judge has un-necessarily presumed and assumed many things and the finding of conviction is based on surmises and conjecture and the finding is one -sided, it would be proper for us to re-appreciate the evidence without

reproducing the part of oral evidence led before the trial Court. Some exercise is required to be done in view of the submissions made on behalf of the accused that the ld. Trial Judge has considered some inadmissible evidence in recording the finding. The hostility shown by number of witnesses examined is also found relevant to appreciate the evidence and to record findings in light of the rival contentions.

20. Non-examination of important witnesses at a proper stage is one of the arguments and it is submitted that the Spl.PP appointed at the instance of the wife of the deceased namely PW Artiben as well as the sequence of the witnesses examined by the prosecution itself has created some prejudice to the accused, otherwise the complainant could have been examined first and other witnesses like the brother of the complainant PW-20 Rahulbhai Patel and father of the complainant namely p-21 Bharatbhai Patel. Complainant Artiben has been conveniently examined at a very late stage as PW-26, but it is important to note that she has been examined prior to the examination of the recorder of the complainant i.e. PW-28 PSI PB Mer and two important witnesses who were posed as eye-witnesses and some massionery workers whose presence were there at Shantivan Farm during the entire occurrence since the morning of the date of incident, were examined at Sr.Nos.1,2, 6 & 11 i.e. much

prior to the deposition of the police witnesses examined by the ld. PP. We are not impressed with this submission because it is the privilege of the ld. Prosecutor, as per the settled legal position to decide the sequence of witnesses and he can drop certain witnesses. Of course, the accused can object such dropping of witnesses and can examine the witnesses cited by the prosecution in the final report under section 173 of CrPC as witnesses of the defence side. So, this argument by itself is not found helpful to the defence side.

21. During the trial, the prosecution has examined 28 witnesses out of which only 10 witnesses have not been declared hostile. PW-3 Mohanlal Sharma, Medical Officer of Sarkhej Community Health Centre who examined PW-1 Gulamanabi Mubarak as an injured witness, PW-4 Hashmukhlal Thakorlal Modi, a Scientific Officer of FSL, Ahmedabad and PW-5 Dr. Ravindra Bhise, Professor of VS Hospital and one of the doctors of the panel of doctors who performed post-mortem on the deceased Arvindbhai, are three witnesses whose evidence can be said to be an opinion evidence. In the same way, PW-23 PSI Mr. PT Bodar of Ellisbridge Police Station was informed by PW-10 Bharatbhai -father of the complainant Artiben at about 3.55 p.m. at Sarkhej Police Station about the incident who went with witness Bharatbhai to Prerana Hospital and statement under section 164 of CrPC has been recorded

of this witness by the ld. JMFC of District Ahmedabad (Rural). In the same way, PW-24 Pravinsinh Kesharisinh was PSO of Sarkhej Police Station who had received the information at about 4.15 p.m. from police constable PW-25 Mahendrakumar of Ellisbridge Police Station who entered the “wardhi” from control room at about 5.10 p.m. PW-25 Mahendrakumar Prajapati is again a police witness of Ellisbridge Police Station who received information at about 4.15 p.m. that a firing has taken place at Shantivan farm who received a telephone call from PSI Mr. Bodar and in turn gave Wardhi-information to Sarkhej Police Station. Witness PW-28 is IO Mr. PB Mer, PSI, Sarkhej Police Station who registered the complaint-FIR given by PW-26 Artiben Patel. So, three witnesses are the police personnels out of these 10 witnesses. So, it can be said that PW-26 Artiben, PW-20 Rahul Bharatbhai Patel and PW-21 Bharatbhai Natvarbhai Patel- father of the complainant Artiben are the only three witnesses who have not been declared hostile and have supported the case of the prosecution.

22. For the sake of convenience, we would like to state some details in short of the witnesses who have been declared hostile by the prosecution. They are:-

(1) PW-1 Gulamanabi Mubarakkhan -Exh.41 who was posed as an injured eye witness and an employee of the deceased performing duties as Watchman in Shantivan Farm.

(2) PW-2 Dasharathbhai Shamjibhai Thakor-Exh.42 posed as an eye witness to the incident, was the servant of the deceased.

(3) PW-6 Dharmendrakumar Hariprakash Meena-Exh.60 who was doing massionery work and had gone to the farm house of the deceased.

(4) PW-7 Rajesh Ishwarbhai Thakor-Exh. 61 panch witness as to the scene of offence panchanama.

(5) PW-8 Samirkhan Sultankhan Pathan-Exh. 63 second panch witness as to the scene of offence panchanama.

(6) PW-9 Girish Mahipatbhai Valand -Exh. 64 panch witness of the panchanama of the discovery of screw-driver referred to as “dismiss” and cloth with which Revolver was cleaned.

(7) PW-10 Amrut Devjibhai Parmar -Exh. 66 second panch witness of the panchanama of the discovery of screw-driver referred to as “dismiss” and cloth with which Revolver was cleaned.

(8) PW-11 Dilipkumar Thavaraji Katara-Exh. 67 who had gone to Shantivan Farm where the incident had occurred for doing massionery work.

(9) PW-12 Rakesh Baljibhai Parghi-Exh. 68 who had gone to Shantivan Farm where the incident had occurred for doing massionery work.

(10) PW-13 Mohammad Hanif Amirali Shaikh, panch

witness of the panchanama of finding out the place of firing by FSL.

(11) PW-14 Devji Babuji-Exh. 71 panch witness of the panchanama of the recovery of cartridges from the wife of the convict accused.

(12) PW-15 Manubhai Bhojabhai -Exh. 73 second panch witness of the panchanama of the recovery of cartridges from the wife of the convict accused.

(13) PW-16 Jayesh Popatlal Chauhan-Exh. 74 panch witness of the panchanama of the recovery of the Revolver from the wife of the convict accused.

(14) PW-17 Shankar Mavji Rathod -Exh. 76 second panch witness of the panchanama of the recovery of the Revolver from the wife of the convict accused.

(15) PW-18 Babubhai Naranbhai Prajapati-Exh. 77 Accountant of Shantivan Farm.

(16) PW-19 Ganeshbhai Kukabhai -Exh. 78 who had gone to Shantivan Farm for doing massionery work.

(17) PW-22 Laluram Kakuvarji Meena -Exh. 79 who had gone to Shantivan Farm for doing massionery work.

(18) PW-27 Jasiben Chanduji Thakor -Exh. 118 who resides at Shantivan Farm and is doing agricultural labour and living her husband Chanduji Vaktaji Thakor in Shantivan Farm of deceased Arvind Amrutlal- an employee of deceased Arvind.

On careful reading of the cross-examination made by the ld. PP of all the aforesaid witnesses and answers given by some of the witnesses who have been declared hostile to the ld. Advocate appearing for the defence side, it emerges that number of witnesses are either under inducement, some pressure or threat. e.g. PW-27 Jasiben Thakor Exh.118 has admitted in the cross-examination of the ld. PP that she had come to the Court thrice (for deposition during trial). It is admitted by her that she was brought in the Court in a motor vehicle of Navrangpura Police Station. She has also admitted that “it is true that she has been given police protection as she was given threats by the accused”. In cross-examination she has said that “it is true that nobody has induced or threatened her”.

23. It is rightly argued by ld. Sr.Counsel Mr. Thakkar that nothing should be presumed and can be presumed against the accused merely because he is a rich man and has a capacity to influence the machinery engaged in investigation or the expert or witnesses in a case instituted against him. It is the duty of the prosecution to prove the case beyond reasonable doubt and wealthy

status or political power or influence of accused can not be looked into by the Court for drawing any adverse inference. It also can not help the prosecution in getting the Court convinced on loose or inadequate facts or circumstances. The Court can not consider inadmissible evidence against the accused even indirectly only because the accused is enjoying a high financial or political status in the society.

24. On reading the cross-examination of PW-20 Rahul Patel- brother of the complainant and PW-21 Bharatbhai Patel-father of the complainant, it reveals that deceased Arvindbhai was residing in Bungalow No.4 in Krishna Society and bungalow of accused No.2 is also there in that very society, but suggestion made during the cross-examination is that the accused No.1 convict and accused No.2 were residing separately. It has come on record in the deposition of PW-21 Bharatbhai Patel that the dispute as to the property between his deceased son-in-law and his father i.e. convict accused No.1 was going on and that he was knowing that fact. It is in evidence that after the death of deceased Arvindbhai, witness Bharatbhai has become the Chairman in 7 to 8 companies and he has been appointed as Chairman of those companies at the instance of his daughter PW Artiben after the death of Arvindbhai and he signs the books of accounts and other resolutions without studying the documents

tendered for signatures keeping trust on his daughter. On proof of contradiction, it has come on record that the daughter of this witness Bharatbhai namely Artiben and his son-in-law deceased Arvindbhai were made separate before about two years and deceased Arvindbhai had made them separate and properties were also partitioned and given to them and since then the family members of the convict accused were not talking with the deceased and Artiben, d/o of PW Bharatbhai. The question put to this witness PW Bharatbhai in para-5 creates an impression and it is also argued by Mr. Thakkar that though deceased Arvindbhai was entitled to any property during the life time of his father, he was given ownership of 7 to 8 companies and other valuable properties including the bungalow in Krishna Society in a posh area of city of Ahmedabad and also substantive portion of the land of Shantivan Farm. There is nothing on record to show directly that on partition, how much land of Shantivan Farm was given to the deceased Arvindbhai, but it emerges that the deceased was put in possession of some part of the land of Shantivan Farm. In the cross-examination of PW Artiben, she was asked to answer a positive suggestion made by the accused convict as regards to the partition of the properties and and the properties that were given to deceased Arvindbhai. The Court is aware that the suggestion made by the defence counsel during the course of cross-examination is not binding to the accused, but

the evidence collected after recording of answers is a part of the deposition of the witnesses to whom such suggestions are made and while considering the evidence of that witness and in turn the evidence of the prosecution or defence as the case may be, the same can be considered. It has come on record that over and above Shantivan Farm, the properties of Godhavi Farm and Kanki Farm were also partitioned, but this witness Artiben was not sure whether it was more than 90,000 sq.mts. Of land. The various figures have been suggested to this witness i.e. PW Artiben (para-5 of the deposition), but while answering the last suggestion made to this witness that her deceased husband had received 98649 sq.mts. of land, she has answered that she does not know the measurement, but she has stated voluntarily that it was a big chunk of land and she does not know about the total area thereof in exact sq.mt. She has admitted that her husband was a builder and was running a business in the name of Popular Construction. The convict accused and the brother of the deceased were also there in the business.Half portion of the bungalow where she resides is in her name and other half is owned by the company and this bungalow had come to their share before about two years when the properties were partitioned. She had also admitted that there is a multi-storyed building known as MK House and one entire floor is in her name. One floor is in the name of her mother-in-law Shantiben and one floor is in the

name of her sister-in-law Silvaben, w/o younger brother of her deceased husband. This MK House has been constructed by the Popular Construction Company. It is in evidence that Shantivan farm was divided into three parts and the area wherein the farm house was erected gone to the share of the convict accused. It is not a matter of controversy that Shantivan Farm was once the property of the family business and there was no existing dividing wall between the portion given to the deceased and rest of the part of that very part. It is also not in evidence that while parting with the possession of the land given to the deceased, in what manner the farm was divided-partitioned. The fact whether it was divided into three major parts has come on record. It was possible for the investigating agency to bring this fact with details on record even in absence of physical boundaries on the spot and in the background of one fact that has come on record through the scene of offence panchanama, but when it is submitted by the convict appellant that the complainant Artiben was also enough rich and her father had become the Chairman of about 7 to 8 companies having valuable properties and the convict himself and his family having good financial background, it is not necessary to concentrate on the infirmities left by the Investigating Agency by not including the details of the partition qua the land of Shantivan Farm. It has satisfactorily come on record that the dispute as to the

property and enjoyment of the portion of Shantivan Farm was existing and actual pakka boundary line was yet to be drawn. It appears that wire fencing was very well there on one side and entry gates of Shantivan Farm at different portions were also different.So, the dispute as to the property has emerged from the record was not only of the property, but also as to the property for which two adjacent owners were at dispute because Shantivan Farm on putting the wire fencing, had not remained one parcel of land. When it is the say of the accused and suggested to the witnesses examined by the prosecution that the deceased himself had partitioned the property prior to about 2 years and the deceased had started staying separately in a separate bungalow, the scene of offence panchanama suggested that something had remained to be crystallized so far as the division of the properties and especially Shantivan Farm is concerned.

25. The contradictions brought on record and also proved through the recorder of the statement can not be read as a substantive piece of evidence and this part of evidence can be used to evaluate the credibility and reliability of a particular witness. Over and above this, a proved contradiction can be considered to appreciate whether the prosecution is consistent in placing the basic story and all relevant witnesses who were required to be examined, have been examined or not. It is settled

law that a fact suggested to a witness during the course of the cross-examination, unless substantiated, would lay a mere thought-stone, but can not take a shape of valid piece of evidence. Hence, the suggestions are made to PW Artiben that no telephone calls were received either from PW Gulamnabi or from PW Dashrath Thakor. However, these two witnesses have been examined. Of course, both of them have not supported the case of prosecution. A crucial argument advanced by ld. Sr.Counsel Mr. Thakkar before us is that for want of corroboration from these two witnesses, the facts stated by Artiben having inimical to the convict accused, should not be believed qua her say that two telephone calls were received; first from PW Gulamanabi and second from PW Dasharath Thakor on the day of incident and the facts stated by her as to the contents of the telephonic conversation with them and that the same should not be accepted as gospel truth. In our opinion, though statement of prosecution witnesses Nos. 1 & 2 recorded under section 164 of CrPC over and above their initial version before the IO Mr. Mer, shockingly, the report sent to the Court under section 173 of CrPC does not bear the name of ld. JMFC Mr. Chaudhari as witness who recorded statements of these witnesses. Before ld. PP could think to examine the ld. Magistrate who had recorded statements of these two witnesses under section 164 of CrPC, said ld. Magistrate surprisingly left India

and, therefore, he has not been examined. We have decided to deal with this crucial aspect that has emerged from the record of the present case in the later part of the judgment, but the fact remains that ld. Magistrate Mr. Chaudhari has not been examined. So, the contradictions made by these witnesses as to the telephonic conversation made by them with PW Artiben has not come on record and no specific suggestions even were carefully made to these two witnesses during the trial qua their statements under section 164 of CrPC. However, the contradictions have been brought on record from their initial statements made to IO Mr. Mer and they have been proved by ld. PP. It is possible for us, therefore, to say that the prosecution is consistent that there was telephone conversation on two different occasions; firstly with PW Gulamanabi and on second occasion with PW Dasharath Thakor. There is no suggestion to this witness i.e. PW Artiben by the defence counsel that she herself has not talked with PW Gulamanabi when first telephone call was received intimating that despite the request and resistance, the work of erection of wall has started. It emerges from record that the work of erection of wall had begun at the place where the wire fensing was existing. When a telephone call was received from PW Dasharath who was a driver and an employee of the deceased working at Shantivan Farm, the deceased was obviously not there at bungalow and the message was

regarding the actual quarrel and the act of firing that had taken place at Shantivan farm. So, the version of PW Artiben as to the conversation that has taken place between her and PW Dasharath Thakor can be relied upon. Merely because PW Dashrath Thakor has not supported the case of prosecution for the reasons best known to the witness, the say of Artiben can be believed and has been believed by the trial Court and we have no reason to say that this part of deposition of Artiben is not reliable or acceptable. On the contrary the same is reliable, acceptable and is with credit. Her subsequent conduct of informing her real brother, her act of rushing to the hospital, arranging for care of minor children who were there at bungalow by calling her brother's wife at bungalow, positively corroborates her say as to the receipt of the telephone call from the employee at Shantivan farm. It is true that some interest, if would have shown by PSI Mr. Mer, he could have successfully collected some information from Tele-Communication Department about the telephone calls made to PW Artiben from the area where Shantivan farm is located because it is in evidence that the employees of Shantivan farm used to make telephone calls probably from different exchanges of City of Ahmedabad or at least from the area called as Makaraba village or from the area where Shantivan Farm is located. The area Code is shown to be Code No.902717 and it is the case of the prosecution that one telephone

call was made from telephone No.39920. This telephone connection was of one Navin Harjivandas Prajapati and PW-18 Babubhai Naranbhai Prajapati has disclosed this fact. Of course, he has not supported the case of the prosecution and he has been declared hostile and he has denied that PW Gulamanabi had come to his place with a request to permit him to make a telephone call on the date of incident, but once it has come on record that the area code of this very telephone number is different than the city of Ahmedabad, the print out of all neighbouring connections could have been obtained by the IO. But this would have added more strength to the say of PW Artiben. In absence of such a strong corroboration, the story of the events that had occurred since the morning narrated by her, if considered in the background of her subsequent conduct after receiving the telephone call-message from PW Dasharath Thakor as to the actual commission of a criminal wrong, the Court can rely upon this piece of evidence.

26. PW Artiben has stated in her examination-in-chief that it was Sunday on 20.02.2000 and on that day, at about 9.00 a.m., her husband had left for going to Shantivan Farm and she was at her home. On that day, she had received telephone from her maternal uncle-in-law Ambalal Jethidas informing that her father-in-law is erecting a wall in Shantivan farm and in response thereto

she had replied that Arvindbhai i.e. deceased had already left for Shantivan farm. This Ambalal Jethidas has not been examined by the prosecution and it is argued that therefore this part of evidence can not be considered being inadmissible piece of evidence as hear-say evidence. On return of her husband at about 12.00 to 12.30 p.m., she was informed by her husband that they people are erecting, but he had instructed not to erect the wall till everything is settled. He had also instructed the watchman that if any one starts constructing wall, then he may be informed. This part of her version was objected on the ground that it is inadmissible as the same does not fall in exception and is barred by section 32 of the Evidence Act. Detailed arguments have been made before us. According to PW Artiben, as it was Sunday, her husband was taking rest at home. Thereafter, a telephone call from PW Gulamanabi(PW-1) was received and he told that " Mota Saheb (i.e. Amrutbhai), Virendrabhai(accused No.2) and Dharmendrabhai @ Tikubhai (accused No.3) have come at the farm and they are starting construction for erection of wall." Because of such telephone call, the deceased had left for going to Shantivan farm. She has further stated that thereafter at about 3.30 p.m., she received telephone call from driver Dashrathbhai Thakor (PW-2) that Amrutbhai (convict accused), Virendrabhai (accused No.2) and Dharmendra (accused No.3) had quarreled with

Arvindbhai (deceased) on the issue of construction of wall and Amrutbhai (convict accused) had fired at Arvindbhai and he has been taken to the hospital. Thereupon, she immediately telephoned her uncle-in-law Dashrathbhai Khodidas and from the other hand, he informed her that Arvindbhai is taken to Doctor House. After knowing this, she had informed her both brothers i.e. Rahul and Chirag. Rahul was called at her residence and Chirag was asked to rush to the hospital as he was residing near Doctor House. A detailed cross-examination has been made on the point of telephone conversation between PW Artiben and PW-2 Dasharath Thakor. One Dashrathbhai Khodidas Patel has not been examined by the prosecution otherwise this witness could have thrown light that from whom and how he had gathered information about the events and shifting of injured Arvindbhai to Doctor House. Who is responsible for this lacuna; whether Investigating Officer or the ld. Prosecutor or both is the question. Unless the Court is able to hold that reference of uncle-in-law Dashrathbhai Khodidas in her deposition by PW Artiben is absolutely a falsehood, the same can be relied upon. Such argument was never advanced before the trial Court. It is simply argued before this Court that as Dashrathbhai Khodidas Patel has not been examined, the say of PW Artiben as to the conversation that has taken place between herself and Dashrathbhai Khodidas Patel is not admissible, but this Court can

positively consider the say of PW Artiben and her version of making telephone call to Dashrathbhai Khodidas Patel by itself is a substantive piece of evidence. Before the ld. Trial Judge, there was strong resistance on the point of exhibiting the FIR recorded by PSI Mr. Mer at Prerana Hospital on 20th, but by passing detailed legal order, the ld. Trial Judge has decided to admit the FIR in evidence and to exhibit the complaint given by PW Artiben. Unless this Court records a finding that the complaint was wrongly admitted in evidence at exh.270 as FIR within the meaning of section 154 of CrPC, the same can be considered for the purpose of seeking corroboration or to contradict PW Artiben as per the settled legal position. In the complaint exh.270, she has stated clearly that she had telephoned Dashrathbhai Khodidas Patel and she received information that her husband has been taken to Doctor House. Without entering into the controversy as to the nature of evidence received by her through said Dashrathbhai Khodidas Patel, it can be said that her conduct to make a telephone call immediately after the receipt of telephone message from PW-2 Dashrathbhai Thakor, is natural and the Court has no reason to disbelieve her as she gets corroboration from the complaint. Of course, this witness has made some improvement and has stated certain facts which are not there in the FIR i.e. about her endeavours to inform her both the brothers and attempts that were made to call his

brother and his wife at the bungalow etc., but this improvement does not modulate directly or indirectly the prosecution story otherwise this witness could have been condemned by the Court on this aspect. Her subsequent conduct to go to Doctor House and informing his brother to go to Doctor House makes one thing clear that she must have gathered information about the name of the hospital where injured Arvindbhai was taken from some other source because it is not in evidence that PW-2 Dashrathbhai Thakor had also named the hospital when he made a telephone call to PW Artiben. It is not in her evidence that she had already knew the name of the hospital from PW-2 Dashrathbhai Thakor. When it is her say that she had first telephonically talked after information was received from PW Dashrathbhai Thakor, with her uncle -in-law Dashrathbhai Khodidas Patel,then it is possible for the Court to infer that she may be telling the truth about the source from where she got the name of the hospital. For the sake of arguments it is accepted that the Court can not draw even an inference for want of evidence of Dashrathbhai Khodidas Patel, such inference can be said to be a conjecture, then also, there is ample convincing evidence to show that in couple of minutes, she had reached to the spot where her husband was being shifted. One undisputed fact has come on record during the course of cross-examination of PW Artiben (para-6) that the distance between the residence and Shantivan

farm is not known to her exactly in kilometers, but in a motor car, it would take 15 to 20 minutes to reach there. It is also in her evidence that she was visiting Shantivan farm frequently on occasions. She has also accepted the suggestion that after partition, fensing was erected. She had voluntarily stated that fensing was made on approximation meaning thereby that on estimation and rough measurements. Of course, she has admitted that basically her husband was not dissatisfied with the share given to him on partition, but the partition was nominal. She had used following words (in vernacular Gujarati language) “... Pan Aashare Bhag Padya...” which would mean that partition was made on estimation and not on meets and bounds. So, it emerges that as such there was no strong dispute or grievance as to partition if partition has finalized exactly as understood and agreed. It is her say that however, there were some misunderstanding between her husband and her father-in-law. In this situation, she might not have even thought that chest of her husband might have targeted and he would have sustained injuries on the chest which may prove fatal. So, the time taken by her in making telephone calls to her uncle-in-law Dashrathbhai Khodidas Patel and to make arrangements for minor children etc. appears to be a natural conduct. There is no exact evidence on record as to whether what is the exact distance between the bungalow of PW Artiben and

Doctor House, but at least by making some arrangements and in couple of minutes, she could reach Doctor House i.e. within 10 to 15 minutes. How much time was consumed by the driver who brought Arvindbhai to Doctor House and in Prerana Hospital, obviously is not there on record. So, when it is not even suggested to PW Artiben that she could not have reached there practically simultaneously with her injured husband at Doctor House, the Court can accept her version that somebody who was present at the spot where her husband received injuries or who was aware about the incident, had informed her. The person who had informed her i.e. PW-2 Dashrathbhai Thakor had named the culprit who was responsible for firing a bullet shot. The name of Amrutbhai referred to by the informant to PW Artiben is that of convict accused. So, PW Artiben was knowing about the name of the person responsible for the fire-arm injury to her husband even before she reached the hospital. Some attempts have been made by the ld. Counsel to show that the convict accused had reached Prerana Hospital at some subsequent stage and he was not present when she reached the hospital. On the contrary, plain reading of her evidence creates a clear impression in the mind of the Court that all the three accused named in the FIR were at Doctor House and in Prerana Hospital. She has narrated that when she reached the hospital, her injured husband /body of her husband was being put on the stretcher from the red coloured car. It is not in

evidence nor it is the say of the defence that red coloured car was owned or occupied by the deceased, otherwise such a suggestion could have been made to either PW Artiben or her real brother PW Rahul. PW Artiben has stated in her deposition mainly in para-2 that she had seen accused Virendrabhai and Dharmendrabhai taking out the body of Arvindbhai from rear side of their red coloured car when she reached Doctor House. There is no detailed cross-examination on the point of the words used by her i.e. (in vernacular Gujarati language) "... Temni Lal Maruti Car Ma Thi ..."(Emphasis supplied) which would mean "from their (owned by them) red coloured Maruti car". Shockingly and surprisingly, the investigating agency had not even cared in the present case to get the best evidence as to the ownership of this car. The car ought to have been seized by Ellisbridge police instantly or after some time it could have been seized by Sarkhej police for FSL examination through expert. Whether Virendrabhai or Dharmendrabhai or both have licence to drive a car also could have been investigated. Even the photographs as to the wheel marks could have been obtained in couple of hours of the vehicles that have entered Shantivan farm on the date of incident. In some cases, the investigating agency did show such enthusiasm to satisfy the need. It is stated by PW Artiben that at that time, she saw that Arvindbhai had a bullet injury on the right side chest and he was

shifted at 4th Floor of the Doctor House. In the cross-examination, she has stated that she had pointed out convict accused to police and thereafter she had seen police talking with the convict accused. There was no reason for the trial Court to discard this part of evidence because the version of a witness has to be evaluated thoroughly and for the purpose, examination-in-chief, cross-examination and re-examination, if any and entire version requires to be read. In our view, this witnesses has stood to the test of cross-examination. We have also no reason to say that the ld. Trial Judge, in accepting the version of PW Artiben has committed an error as submitted.

27. Ld.Sr.Counsel Mr. Thakkar, as mentioned earlier, has tried to argue that as per the rule of best evidence, the prosecution has not even proved the place/scene of offence nor it is proved beyond doubt that any of the accused had brought the deceased to Prerana Hospital and Amrutbhai-convict accused in all probability might have reached the hospital with an anxiety like the father of PW Artiben. We do not find any merits in this submission. It is true that by documentary evidence, ownership of the read coloured Maruti car could have been established by the prosecution, but when it is on record without controversy or convincing challenge that red coloured Maruti car belonged to the accused, then reliability of

the witness who has stated this fact on this very aspect can be considered. PW Artiben who had stated this fact, is not a stranger to the accused. She is the wife of the younger brother of accused and sister-in-law of the third accused i.e. Dharmendra @ Tikubhai. It is in evidence that injured had gone to Shantivan farm not once but twice on that very day. Firstly in the morning when probably he was not aware about the development that had taken place at Shantivan farm. Only after he left his bungalow for Shantivan farm, wife of the deceased- PW Artiben had received a telephone call from her maternal uncle-in-law, is her say and on receipt of telephone call from the watchman PW Gulamanabi, deceased had again left for Shantivan farm. Merely because no blood spot could be detected at the place of incident nor any used cartridges have been recovered from the spot, it would not be proper to jump to a conclusion that the place of incident must be some other place than pointed out by the prosecution and the prosecution is hiding the actual place of incident because in couple of minutes, the place of incident was disclosed before the Ellisbridge police. The entry made by Sarkhej police at 16.15 hours at least disclosed the place of incident and Ellisbridge Police Station has intimated Sarkhej Police Station that because of fire-arm injury, one person has been brought to Doctor House, the firing has taken place at Shantivan farm and, therefore, they should inquire from Shantivan farm about

the firing. When according to PW Artiben her husband had left for Shantivan farm on a telephone call from PW Gulamanabi at about 2.30 p.m. and thereafter she had received telephone as to the incident from PW-2 Dhasharath Thakor at about 3.30, then the disclosure as to the spot of incident before the police satisfactorily establishes one fact that the incident had occurred at Shantivan farm. Some dispute was there as to the property and Shantivan farm is one of such property. Of course, the scene of offence panchanama panchas have not supported the case of the prosecution, but the police officer who has drawn panchanama has satisfactorily proved the scene of offence panchanama in the early hours on 21.02.2000. One important content of panchanama exh.62 has been proved specifically by this witness that the place where he recorded panchanama, a digged foundation was already there and one stick was also lying there on the spot. FSL experts were also requested to remain present and they had made observations of the spot of incident. The experts have given their report (exh.124). Of course, he admitted that when he drew panchanama, no things like sand, bricks or cement were lying which normally are being used for constructing the wall. The place is a large chunk of land. The day on which the scene of offence panchanama was drawn, at that very point of time, FSL experts were not there, is the admission of PSI himself. However, he has stated that he has mentioned

that certain articles like Kodali (hoe), Pavda (spade) and Trikam (pickaxe) were there. Surprisingly, Sarkhej police has not put any surveillance as it appears from the evidence of PSI Mr. Mer immediately after 16.15 hours moment his police station received message as to the commission of a very grave offence. If such surveillance was kept, then for the reasons best known to the investigating agency, nothing was placed before the Court. It is true that these contents of the panchanama require to be proved and only proved part can be read in evidence. The presence of articles/equipments which can be used in digging foundation for erection of a wall mentioned in the panchanama and proved by PSI Mr. Mer vis-a-vis the fact that he had seen the existing digged foundation, is sufficient for believing the say of the prosecution that the incident had occurred at Shantivan farm. When it has come on record in evidence of PW Artiben and other witnesses including two hostile witnesses viz. PW Nos. 1 & 2 that there was a wire fensing between the portion of the land given to the deceased and the adjacent owner Amrutbhai i.e. convict accused, then the admission made by two hostile witnesses can be used as relevant piece of evidence if it is found otherwise consistent and corroborating each other and also to the basic say of the complainant PW Artiben. In para-8 of the deposition, PW Gulamanabi has stated that “it is true that police had taken him to a cement pole of

fensing of Arvindbhai i.e. deceased and Amrutbhai i.e. convict and at that place, a digged foundation was there. He is not aware that what was the length of it, but it was about 1 to 2 ft. wide and ¾ ft. deep. He had seen such digged foundation for a length of about 40 to 50 ft. before 4 to 5 days from the date of incident and when police had taken him, addition of about 15 ft. in foundation was seen by him.” In the same way, PW 3 has admitted in the cross-examination made by ld. Spl.PP that he has stated in his statement dated 21.02.2000 that “Gulamnabi Chacha is the watchman of this farm, he resides in the farm. This farm is divided into two parts out of which centre portion was of his employer i.e. Arvindbhai (deceased) and the portion towards bungalow belonged to the father of his employee i.e. Amrutbhai (convict) and other side portion is of Virendrabhai @ Nikulbhai and that he is “Nana Seth”. “ It appears that this witness was addressing his employer Arvindbhai as “Sheth” (Master/Employer), convict accused as “Mota Sheth” and accused No.2 Virendrabhai as “Nana Sheth” (Younger Master). This evidence also helps the prosecution in proving the actual place of incident. If actual survey was required to be made, then the deceased might have objected the actual erection of a pakka boundary wall between the portion given to him and the portion which was to remain with his convict father. It is in evidence that entire Shantivan farm is otherwise

covered with a boundary wall of about 8 ft. height. When the incident had occurred in Shantivan farm and the controversy was on the point of construction of boundary wall on one side of the portion of which was given to the deceased, then the say of the prosecution can be said to have been established beyond doubt that the incident had occurred within Shantivan farm and that at some interior place.

28. The place of incident when is satisfactorily established at Shantivan farm, then who could have brought the injured to the hospital is also a question. The say of the prosecution is that the accused themselves brought the injured to the hospital. Relationship between the deceased and accused is not a matter of dispute. When it is argued that the convict accused is a looser at both the ends viz. He is suffering incarceration and in an old age is not able to enjoy the wealth which he had earned and on the other hand that he has lost his son. This argument by itself needs no consideration because it is not suggested to either PW Gulamanabi or PW Dashrathbhai Thakor who were posed as an eye-witness to the incident by the prosecution, that they were responsible or the persons active in bringing the deceased to the hospital. Both the witnesses were employees of the deceased Arvindbhai. So, they would be more interested in taking the injured to the hospital,

but they would have taken the injured normally to a government hospital or to VS Hospital. When PW Artiben had seen two accused persons out of the three taking out the body of her injured husband from the rear side of red coloured Maruti van and before his body was taken to the fourth floor in Prerana hospital, when she had seen the injury and the place of bullet injury on the right side chest of the deceased, why her evidence should be discarded more particularly when two out of three accused have brought the injured to the hospital. Whether deceased Arvind had a life or it was a dead body is again a question, but the fact remains that as discussed earlier, either the dead body or injured Arvindbhai was brought to the hospital by them in red coloured Maruti van owned by any of these three accused. The car was not of the ownership of the deceased as mentioned earlier. What happened to the car which was taken by Arvindbhai to Shantivan farm is again a part left open by the investigating agency for the reasons best known to them. Accused Nos. 2 & 3 have been acquitted. It is in evidence that on the arrival of all the three accused at Shantivan farm, PW Gulamanabi had made a telephone call and his employer deceased Arvindbhai was informed that they have started the work of construction of a wall. Of course, PW Gulamanabi has not supported the case of the prosecution, but as discussed earlier, the say of PW Artiben on this point is found reliable. The contradiction proved in this

regard by the prosecution strengthens the say of PW Artiben and makes the case of prosecution consistent on the point. So, when the accused persons were present they being the kith and kin, may have brought the deceased to the hospital. Normally the answers to the question whether the accused would take the injured to the hospital, or their conduct is found strange, would be in the negative. However, in number of cases, when victims are close relatives having some blood relation or other close relation, the culprits are either rushing to the police or to the hospital either with information or with the victim. This is the experience of the Court and there are number of decisions revealing such or similar facts. Without entering into this discussion, it would be sufficient to mention that the behaviour of the accused persons are found strange in number of cases and it may very from case to case. Unless it is found that the conduct of the accused would be either strange or of a innocent person, the prosecution should not be asked to explain as to how and why the accused should have brought the injured to the hospital. The selection of a private hospital in such a grave case also indicates the guilty behaviour. The accused might be hoping for good reasons for survival of Arvindbhai or being lay-men, they might not be aware that the injured is dead because it is in evidence that the doctor who was present at Prerana hospital declared him as dead. An attempt is also made

during the course of cross-examination of Dr. Bhise that the injured might have survived for some time and, therefore only, the condition of food in the stomach was found semi-digested. It is in evidence that in couple of minutes, Amrutbhai -convict was also seen in Prerana Hospital by PW Artiben as well as by father of PW Artiben i.e. PW Bharatbhai Patel and PW 20 Rahulbhai- brother of PW Artiben and he was interrogated by police, otherwise there was no reason for the police to make inquiry from him about the incident if he was a stranger and totally innocent to the incident. When he was present at Shantivan farm, then his presence immediately at Prerana hospital along with other two accused persons along with the body of deceased Arvindbhai by itself creates a circumstance which would go against the convict accused. As discussed earlier, the name of accused Amrutlal was disclosed to Artiben and she had pointed out the accused to the police. Thereafter, one fact that has come on record in the evidence of one of the prosecution witnesses that the convict accused thereafter was sent to Karnavati Hospital under a police escort which indicates that he may be in some other vehicle, but was a party in arranging the transfer of injured Arvindbhai to some known hospital. The conduct of accused vis-a-vis the other circumstances and the oral evidence of PW Artiben, Rahul and Bharatbhai satisfactorily establishes that all the three accused were party in bringing the injured to

Prerana Hospital at Doctor House.

29. It is settled that a suggestion made by the ld. Counsel to the prosecution witness or any expert who is called to give opinion evidence, is not binding to the accused and it is the experience of the Court that in number of cases, certain questions are being put by the ld. Counsel appearing for the parties to an expert in a witness box which can be said to be of fishing nature. If a suggestion is made to the doctor who has performed the post-mortem while disputing the time of death, should be considered in the background of the defence plea taken by the accused. At one place, in the cross-examination Dr. Bhise was suggested a question, placing facts mentioned in the post-mortem notes as to the condition of the food found in the stomach of the deceased that a person must have died after the lapse of some hours from his last intake of food. No detailed questions have been asked to the doctor as to the type of the food found from the stomach, nor a pointed question was asked to the wife of the deceased as to when the deceased had his last intake of food. The condition of food and stomach after the lapse of some time depends on the quality of the food and on some occasions the quantity of the food taken by the deceased. In absence of such suggestion and the evidence on record, it is possible to infer that the say of the accused indirectly to the expert was that the

deceased must not have died within an hour or two from his last intake of food and/or he may have survived for some time even after the injury sustained by him. When it is in evidence that the deceased had left his home for Shantivan Farm between 2.00 to 2.30 p.m. and was brought in Prerana Hospital in Doctor House latest by 3.30 or 3.45 p.m.- a place where a person from Shantivan Farm can reach within 20 to 25 minutes in a motor car, then it is possible to conclude that the accused persons were there in the company of the deceased till the last breath. It is true that the presence of the accused persons at Shantivan Farm in the after-noon on the date of the incident is seriously disputed by the defence side, but when as discussed earlier, the say of PW Artiben is found acceptable as to the presence of the accused persons at Shantivan farm and accused Nos. 2 & 3 were the persons who were seen personally by PW Artiben taking out the injured from the rear portion of their red coloured maruti van at Doctor House vis-a-vis the presence of accused No.1 in Prerana Hospital at that very relevant point of time, would go against the convict accused because in this situation, he was under an obligation to satisfy the Court showing at least sound probability as to how and why on Sunday he was present in Shantivan farm and was seen in Prerana Hospital where injured was brought and where thereafter he was declared dead. On careful reading of the statement of accused

No.1 recorded by the ld. Trial Judge under section 313 of CrPC, it clearly transpires that the same is not sufficient and satisfactory for giving any reasonable and plausible explanation. It can be argued that his presence even if it is found to be established in Shantivan Farm in the after-noon on Sunday, then it is not inconsistent with his innocence because he was the adjacent owner of one part of Shantivan Farm land after partition and erecting wire fencing with the support of small cement poles. It also can be argued and it is so argued that the presence of accused No.1 at Prerana Hospital may be like the presence of a father of PW Artiben. Knowing the condition and the fact of injury sustained by his son, he might have rushed to the hospital and he is not residing at a distant place. It was possible for him to rush to Prerana Hospital in couple of minutes. So, this would also not go against accused No.1 because his presence in Prerana Hospital would not add any strength in the case of prosecution. This fact and circumstance is also not inconsistent with his innocence and it should not be either presumed or assumed in absence of any evidence that he was a party in bringing injured to the hospital and was knowing about how and why the deceased sustained bullet injury. But this argument is not found acceptable to us because as observed earlier, PW Artiben was already informed by a witness (of course a person declared as hostile witness) on telephone that Arvind-

deceased had sustained injury in firing made by Amrutbhai i.e. accused No.1 and PW Artiben was knowing that the convict-accused is the culprit and it is also in her evidence that she pointed out Amrutbhai to police and thereafter the police had conversation with Amrutbhai. This evidence cuts the above arguments advanced claiming the possibility of innocence.

(i) Here, one more aspect also would go against the accused. It is not matter of dispute that the convict accused from Prerana Hospital was taken to Karnavati Hospital and for this police witnesses have led evidence in this regard. Even Mr. Thakkar, in response to the query raised by us admitted that fact. The accused was taken to Karnavati Hospital and there are other proved circumstances from which it is possible to say that the convict accused was taken from Prerana Hospital to Karnavati Hospital for treatment he being old and also having history of some diseases including heart disease and so he might have decided to go to Karnavati Hospital for better treatment being more equipped hospital. But the convict accused was very well there in Prerana Hospital and it is not in evidence that he had become critical at any moment on account of a shocking news of the death of his son. On the contrary, in view of the nature of bullet injury found crucial, the question would be that for how many minutes the deceased could have

survived after receiving bullet injuries. Of course, no pointed question was asked by the ld. Spl.PP to PW-5 Dr.Bhise that with the injuries that he had seen, one can survive for how much long period? In cross-examination (para-14), it has come on record that entry wound found in the present case is indicative of the fact that the bullet was fired either from a closed range or from a very near range. It is in evidence that entry wound was showing collar abrasion and the shot must have been fired in a straight line. There is no exit wound. It is mentioned in the post-mortem column No.17 while describing injury No.10 thus:-

> " Entry wound on the right side of chest in third intercostal space on front, 4 cms. Lateral to median peane, circular about 0.5 cms. In diameter with abrasion collar. The skin tags are seen going inside."

Internal injury in reference to injury No.10 has been noted in column No.20 of the post-mortem notes which reads thus:-

> " Tract of the Entry Wound :- It has pierced third intercostal space & has pierced through the Right Lung in its upper lobe & has gone into the dome of diaphragm. It has come out of diaphragm &

has penetrated the Right lobe of Liver in its upper part. It has come out of Liver & has touched the body of L-2 vertebra from where it is seen going into the retroperitorial planeen right side. The bullet is traced lying in the muscles of right side of back at L-2 level. It is isolated by blunt dissection & taken out & preserved.

Right side of Thoracic cavity and abdominal cavity each contain about 15 liters of blood & clots.

The tract is directed above downwards, medially & backwards from right side."

The travel area of bullet inside the body clearly suggests that the vital inner parts like diaphragm and liver along with upper lobe of the right lung were seriously damaged. We are afraid, the injured must not have survived beyond some minutes. There is no evidence that within how many minutes the arrangements to shift the injured to the hospital were made, but it is in evidence that the deceased was declared dead when the body was brought at Prerana Hospital. At one place, PW Artiben has stated that the body of her husband was being taken out from the rear portion of the red coloured maruti van and was being put on a stretcher and thereafter he was taken to four floor. This sentence has been focused before us while arguing on the point of

delay made by the complainant in disclosing the name of the accused. So, the accused No.1, as emerging from the evidence on record, had remained in Prerana Hospital for some time and it is not directly or indirectly suggested that after the final say of the doctor of Prerana Hospital as to the death of the injured Arvindbhai, the accused No.1 collapsed and he was required to be shifted to Karnavati Hospital so as to meet with the emergency.

(ii) PSI Mr. Bodar of Ellisbridge Police Station has stated that PW Artiben was present in Prerana Hospital when he had reached Prerana Hospital and wife of the deceased viz. Artiben had informed him that her father-in-law Amrutbhai-accused has fired a bullet at Arvindbhai i.e. her husband. Of course, for the reasons best known to PSI Mr. Bodar, he had not informed his police station about this fact. This strange behaviour or negligence on the part of PSI Mr. Bodar would not go against the strength of the evidence of PW Artiben because he had disclosed the name of the convict at first available opportunity to PW-23 PSI Mr. Bodar (Exh.100).

(iii) On the contrary, it has come on record that accused Amrutbhai had complained that his health is not good and he has diabetes and kidney problem and he want to go to the hospital. Mean while, one Dr. Mr. RK Patel had come and he had told the police that Amrutbhai i.e.

accused should be taken to hospital. So, he was sent to Karnavati Hospital under a police escort-surveillance. It is the say of PW Mahendrakumar Prajapati that he was with convict accused when he was taken to Karnavati Hospital from Prerana Hospital. So, it is satisfactorily established that the convict accused was very well present at Prerana Hospital and he has shifted himself to Karnavati Hospital, though he was not otherwise critical. Normally, the father taking regular treatment for diabetes or kidney problem, would not leave the hospital where the dead body of his young son is lying and his daughter-in-law is sitting on a cot whipping and sobbing. This conduct of the accused is unnatural and it gives an impression to the Court that under the pretext of his earlier illness, he escaped from the spot conveniently and that too with the help of police. More shocking and surprising thing to us is that neither Mr. Bodar nor IO Mr. Mer had cared to get thorough check-up of the accused immediately before permitting him to go to Karnavati Hospital. If his name was not disclosed as accused or the person responsible for firing, than why Mr. Bodar decided to send him to Karnavati Hospital under a police escort and that too with a person of his confidence i.e. PC Mahendrakumar Prajapati. A plain reading of the deposition of PW Mahendrakumar Prajapati and Mr. Bodar and the role played by this witness Mr. Prajapati in informing Sarkhej Police Station, it is

clear that he is one of the key police personnels in the investigation branch of Ellisbridge Police Station. He was sent in the team of Japta- Escort while sending the convict to Karnavati Hospital. No care is taken by PSI Mr. Mer in collecting the documents from Prerana Hospital, if they were there nor from Karnavati Hospital. Karnavati Hospital authority must be in possession of the relevant documents including the admission of accused Amrutbhai and the nature of treatment given to him on his arrival. It is also surprising that why this accused was not sent to VS Hospital or Civil Hospital even in Ambulance of Karnavati Hospital for physical check-up to ascertain whether he has any external marks of violence on the body. These are all material infirmities, but these infirmities have cropped up because of sheer negligence of PSI Mr. Bodar and PSI Mr. Mer or because they were not performing their obligatory duties honestly, are the questions, but this Court is not supposed to answer these questions. At this stage, it would be sufficient for us to quote para-31 of the decision of the Apex Court in the case of **State of Punjab v/s Baldev Singh, 1993(3) GLR 2483.** It reads thus:-

> “31. There is indeed a need to protect Society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it

does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the officials concerned so that the laxity on the part of the investigating authority is curbed."

In number of cases, the accused have been given advantage by the Courts on account of laxity on the part of the investigating agency and on equal number of cases, the Courts of this country have ignored the laxity or failure on the part of the investigating agency when it is found to have been committed because of either incompetency or for some other ulterior motive. Of course, in such cases, the other evidence, direct or indirect, must be there which can be said to be sufficient to link the accused with crime. In some cases, the Courts have remanded the matter back and in exceptional circumstances, the Courts have ordered re-trial. It is not necessary to mention the names of these decisions chronologically, but according to us, this case does not fall in the category where by further examination or cross-examination of the witness or witnesses is required. In our view, this case does not fall in the category of the case where;-

(i)witness or witnesses are required to be re-called and examined by the trial Court;

(ii)calling of a witness before this Court and for asking certain questions by this Court; or

(iii)remanding the matter back by issuing directions or order for retrial;

because in our opinion, there is sufficient evidence on record beyond doubt to link the accused convict with the crime in question and the laxity or non-performance of duties meticulously and in accordance with law by PSI Mr. Bodar and Mr. Mer would not affect the ultimate strength of the case placed by the prosecution. Accused Nos. 2 & 3 who have been acquitted by the trial Court, of course has got an advantage, to some extent of some negligence and laxity on the part of investigating agency, but the law is materially different in the cases where the Court is asked to deal with the order of acquittal than to deal with the order of conviction. The settled law is that merely because some other view is possible, the order of acquittal should not be reversed by re-placing the other possible view by re-writing the judgment. The case of the convict appellant is materially on different footing and that was the say in nutshell of Mr. KT Dave, ld. APP appearing for the State when he was making submissions in acquittal appeal filed by the

State, in response to the queries that were raised by us.

30. As mentioned earlier, this is a case of firing of bullet from a Revolver probably from a near range or a close distance. The prosecution has not explained as to how other nine injuries that were found on the body of the person deceased were sustained by him. Some injuries were possible even by a fall on earth and some might have been sustained while putting the injured in hasty manner in the car in which he was brought to Prerana Hospital, but some of the injuries appear to have been inflicted. If the fatal injury is seen i.e. injury No.10, it is inferrable that other injuries must have been inflicted prior to the fatal injury because there was no need to inflict the other injuries after firing a bullet from a near range or close distance and injured must have fallen down on the earth. The injured PW Gulamanabi, a hostile witness, could have given details of the incident that had occurred along with the driver Dasharathbhai Thakor, but for want of supporting evidence of these two witnesses, nothing has come on record. It is not the say of any of the accused directly or indirectly that any of them had sustained injuries in the incident. It is amply established that some attempts to dig the foundation was made earlier and on the date of incident also that activity had started despite of resistance by the deceased and the convict accused after partition is

emerging as adjacent owner of one portion of Shantivan Farm. It is true that the accused was the ostensible owner of the entire businesses that were running in various names and style by forming companies. Some companies having administrative command of accused No.1, must be the owner of the property of Shantivan farm in stricto-senso, but the business being the family business, it appears that the property was partitioned and the companies were put under the command and control as per the formula worked out. This fact is emerging from the cross-examination of PW Artiben, Bharatbhai and Rahulbhai. So, the point of dispute was towards the side of the land portion which had remained with the convict accused. For the properties and on account of money disputes, it is experienced day in and day out by the Society that the people are behaving in strange and surprising manner. Sons have killed their fathers, wives have killed their husbands, brothers have killed either their brothers or sisters and vice-a-versa. So, we are not impressed by the arguments advanced by Mr. Thakkar that why the father should kill his son and that too for the property when he himself is old and having ailments like diabetes and kidney problems. We have also thought one point which was not even argued before the trial Court nor that has been argued before us that whether to save his son or son-in-law, the convict appellant could have made a show in an indirect way that he is the person

who had fired so that if the table turns in favour of the prosecution even after all proper or improper efforts made, than the appellant accused would go to jail and young generation can be saved from the grave punishment of life imprisonment, but the question posed by us to ourselves gets answer from the evidence of PW Artiben and disclosure of the name of accused to PSI Mr. Bodar in couple of minutes from the incident and the conduct of the accused of escaping from Prerana Hospital conveniently and the fact that he is the only person who could have possessed fire arm from which muddamal bullet mark-”F” could have been fired along with other aspects that we have discussed in detail herein above, the said possibility is also ruled out. It was not impossible for accused Nos.2 & 3 as they were present at the scene of offence to over-power the deceased even if he had become violent and group of labourers engaged for the contract work were also appears to be present there. It is true that none of the labourers have supported the case of the prosecution and they had denied their presence at the place of incident. It is true that there was no material found lying which can be used in construction of the wall, but the scene of offence panchanama has been drawn on the next day and there was no police surveillance on the spot of the incident since after-noon of the day of incident. There is no evidence on record as to what had happened to the motor car that the deceased had taken to

Shantivan Farm. It is in evidence that the deceased was using contessa car. PSI Mr. Mer whether had ever inquired on this point, has not been stated by him in his examination-in-chief. Obviously, therefore, no questions have been put to him in this regard. So, non-availability of the material for the purpose of construction on the spot, would not tilt the balance against the prosecution. On the contrary, it appears that somebody had made attempts to increase the length of the foundation that was digged for the purpose for construction of the wall because the admission made by PW Gulamnabi emerging in the cross-examination (para-8 of Exh.14) is to the effect that digging of foundation had started. The activity to erect a permanent wall at the place where wire fencing was existing and the investigating agency had taken photographs of the spot. They were about 17 photographs produced vide mark 40/1 to 40/17, and out of 17 photographs, in two photographs, muddamal stick is also found seen. It appears that no attempts were made to get these photographs exhibited by ld. Spl.PP and this inaction has tempted the accused to argue before us that the prosecution has failed even to establish that the incident had occurred at Shantivan farm beyond doubt. If the photographer was a police photographer, than he could have been examined and in the same way, it was possible to record the statement of the photographer and examine him as witness by citing him as witness. But nothing is

brought to our notice either by ld. APP Mr. Dave or ld. Sr.Counsel Mr. Thakkar in this regard. The bullet mark that was seen on the trunk of the tree of Shantivan farm was possible by 0.22 Bore bullet is the opinion expressed by FSL expert. One of the star argument advanced by ld. Sr.Counsel Mr. Thakkar is that this opinion helps the theory placed by the defence side that the police has played with muddamal bullet by tampering the seal of the hospital because the bullet found by Dr. Bhise and the panel of doctors was also of 0.22 Bore having 0.5 cms. Diameter, but it is important to note that on first visit by police or expert, nothing was found like mark of bullet hit in Shantivan Farm, but on the second visit of FSL expert, this bullet hit mark was seen on the trunk of the tree. It is neither the say of the accused nor investigation that any other accused i.e. accused Nos. 2 & 3 are holding valid licence of a fire arm like Revolver through which 0.5 cms. Bullet can be fired. Of course, ld. Sr.Counsel Mr. Thakkar has made one submission which according to us is vague for want of cogent circumstantial evidence on record that some other family member of the accused convict did possess the licence to hold a fire arm viz. the fire arm through which the bullet described in the post-mortem note could have been fired. It is true that it is not obligatory on the part of the accused to place the defence nor to prove the plea of defence beyond reasonable doubt. The accused can show

pre-ponderance of probability, but in absence of any question placed to the Investigating Officer that he had ever investigated on the direction whether any other two accused persons hold a licence to possess such a fire arm. This is an important lacuna emerging from the record. If there is no investigation in this direction, then it can give rise to the shadow of doubt, but the accused can not take advantage of the assumption that there was no investigation in that direction. The prosecution is not supposed to lead in all cases a negative evidence because it was possible for the Investigating Officer to say that the attempts to investigate in that direction were made and it was found that none of the two accused other than the convict was holding such a weapon either under a valid licence or unauthorizedly.

31. On careful reading of the deposition of Dr. Bhise and Ballistic Expert, it is clear that none of these two witnesses was shown the muddamal bullet, but in absence of any express opinion either positive or negative and the eligibility to express any opinion, it was not possible for the Court below to hold that the muddamal bullet could not have entered the body through the entry wound. Elasticity of a human skin and in absence of the evidence as to exact measurement of collar abrasion, it is not possible for us to accept the arguments that the

muddamal bullet could not have entered through the entry wound hole that was seen by Dr. Bhise and thereafter FSL Expert Mr. Modi.

32. This is a case where Ballistic Expert Mr. Modi was recalled by the Court under section 311 of CrPC vide order dated 24.04.2002 i.e. after the examination of 19 witnesses. In the same way, Dr. Bhise was also recalled and questions asked by Spl.PP and the cross-examination made by the defence counsel are too magnifying the point whether the bullet actually recovered from the body of the deceased was different than the muddamal bullet brought before the Court and examined by FSL and the Investigating Agency has attempted to create evidence by playing with the sample bullet that was seen by the doctor. Most of the questions asked to these two witnesses are found technical and both the experts have responded to these questions on the strength of their expertise and observations which both of them had made. There is nothing in evidence of police witnesses that when and where all the three witnesses were interrogated, but for the reasons best known to the Investigating Agency, three used cartridges viz. three caps of bullets and muddamal Revolver have been recovered separately and there is time gap which according to us, is more than reasonable when they were recovered and being seized at the instance of the wife of the convict. Surprisingly, the wife of the convict has

never been examined by the prosecution and it is not even stated by the Investigating Officer that her statement was ever recorded . She was a competent witness and as mentioned earlier, at first instance, the Investigating Agency was not able to recover these very articles from the house of the convict accused. One of the probabilies is that at first instance, no reasonable and sincere efforts were made for seizure of these articles or they might have been brought subsequently and second probability is that by that time, these articles might be lying somewhere else than the residential premises from where it has been recovered at the instance of the wife of the convict accused. Both these probabilities are not able to help the convict because it is not the say of the accused that the muddamal seized does not belong to him and he was the only person who could have explained how three caps of used cartridges could be recovered. In absence of any evidence by the wife of the accused, it would not be either legal or proper for the Court to draw the inference that the police may have taken Revolver along with all live cartridges and after firing three shots from the Revolver to have corroboration to the prosecution version that was given by the prosecution witnesses, the police played a drama of recovery of the weapon from the house of the accused at the instance of the wife, because prior to the time of recovery of the weapon, it is the say of the

prosecution that the muddamal bullet recovered from the body was already sealed. There is ample force in the submission of ld. APP Mr. KT Dave that the law of search and seizure would not apply qua the articles taken out of the body during the course of post-mortem. There are some other exceptional cases where the law of search and seizure as established by the Law with regard to search, seizure or recovery of muddamal articles or samples etc., would not be made applicable. So, the decisions cited in respect of the cases based on the N.D.P.S.Act or the cases of taking samples under The Drugs & Cosmetics Act or The Food Adulteration Act, would not apply to the present case. Of course, the ratio can positively help the accused of any criminal case wherein the Courts have said that the scope of tampering with the sample or sealed articles should be considered and the Court should rule out, if questioned, the possibility of such tampering. If the argument of ld. Sr.Counsel Mr. Thakkar is accepted that as no rules or directions as to how the muddamal articles/properties or incriminating material recovered from the body of the person deceased during the course of post-mortem are prescribed and therefore the recovery and sealing of the muddamal bullet produced before the Court should be held invalid recovery in the eyes of the law, in that event no reliance can be placed on such recovery. We are not in agreement with the submission that when it is settled that during the course

of investigation any article or property is to be seized, then it should be seized under a panchanama and so, while seizing the muddamal bullet by the doctor if no panchanama is drawn, then it would not be safe to rely on the sealing process adopted by the panel of doctor because it can not be tested on the touch-stone of the truth for want of independent panchas. Taking out the articles from the body of the person deceased during the post-mortem is neither a recovery during the investigation nor recovery by the Investigating Agency. In stricto senso, the articles taken out from the body during the operation or post-mortem, are the doctor's property, but in medico-legal cases, these articles and properties are being regulated by law and in turn or otherwise these articles can be handed over to put the criminal law in motion or to help the machinery which has undertaken this exercise and in this process the muddamal bullet was given to the police by the panel of doctors and to attach sanctity to the genuineness of such recovery, the muddamal bullet was sealed with the seal of Forensic Medicine Department of VS Hospital. Thus, the recovery of the articles from the person of the deceased during operation or post-mortem, is a formal recovery and the same is not required to be recovered under a panchanama as contemplated under the law qua the recovery of articles during the course of investigation. If the argument of Mr. Thakkar is accepted, then it may touch

large number of cases wherein the doctors are taking out number of things/articles/ properties viz. liquid from stomach, may be a liquor or poison, pieces of bird-skin and even the viscera sealed by the doctor on completion of post-mortem. Such recovery of articles, in such circumstances, are not required to be viewed with doubt merely because recovery of such articles are by the doctor as the procedure adopted by the doctor of sealing such articles always not in presence of panchas nor is under a formal panchanama. The same is simply recovery of articles from the person deceased and not the recovery of muddamal articles during the course of investigation by the Investigating Agency. Merely because, in the present case, the accused had raised one point of tampering with muddamal article bullet, it is not possible for us to say that the recovery of articles from the body or from the body of the person deceased during autopsy/post mortem, being not in presence of panch witness or not under any formal panchanama, should be viewed with suspicion and no reliance should be placed on the evidence given by the doctor about sealing of the article before handing over to the police for further analysis. It has come in evidence that the deceased, his brother i.e. accused No.2 and convict accused NO.1 had notionally separated the properties as well as family business was divided amongst these three main persons of the family. A fact alleged by the prosecution is that the

muddamal Revolver and three caps of used cartridges have been recovered from the residence of the convict accused. There is nothing on record which can be said to be of cogent piece of evidence to show that accused Nos. 2 & 3 or any one of them were jointly occupying the residential bungalow of accused No.1. So, these two muddamal articles have been recovered at the instance of accused No.1's wife and from the house of accused No.1. The doubt focused by Mr. Thakkar is based on more than one aspect, but one of these aspects is with reference to the description of bullet given in the forwarding note sent by the police to FSL. If the bullet was actually sealed at the time of post mortem and the seal has reached to FSL, then how the Investigating Agency could come to know about the size of the bullet while preparing the forwarding letter to FSL? The submission that the prosecution has failed to prove beyond reasonable doubt that the deceased died because of bullet fired from the muddamal Revolver and the bullet allegedly recovered from the body of the deceased has not been brought before the Court and it is submitted that the Investigating Agency has not even cared to trace out the weapon and other live cartridges if they are there keeping notes made by the panel of doctors in the post mortem notes, should be given any weightage, is the question. To cut short the investigation or with a view to prejudice the prosecution and the complainant, whether

the Investigating Agency adopted a short cut to link the accused No.1 with the crime by replacing the bullet and muddamal Revolver whether is one of the possibilities, is the question. The mistake committed by the Investigating Agency due to sheer negligence or with ulterior motive, have been scrutinized by the Courts of our country and it is being experienced by the Court now a days that the search for truth mainly remains in the hands of Investigating Agency and then to some extent with the prosecuting agency. It appears from the evidence that true attempt perhaps was made by the FSL as there was no requisition by the Investigating Agency to find out the blood group on the muddamal bullet sent for examination to FSL. It is neither the evidence of Mr. Modi nor any document is found from the record under which it can be said that the muddamal bullet was ever sent to serological section of FSL to trace out the blood components if they are there on the bullet. So, it would not be possible for the Court to jump to any positive or negative conclusion that the bullet sealed by the doctor had not reached to FSL for examination and somebody had tampered with the muddamal bullet. An attempt to trace out the blood from the muddamal bullet, according to us, would have added some more strength and the lacunas left by the Investigating Agency and the prosecution while producing the evidence before the trial Court, are not found in any way advantageous to the convict accused

because the opinion of the Ballistic Expert categorically sates that the muddamal bullet is a bullet which must have been fired from the muddamal Revolver. The opinion expressed after examining the weapon as well as the caps of used cartridges of muddamal bullet with the test fired articles taken up for comparison from various angles including by using Comparison microscope. Though there is no clear mention of individual characteristic , but the expert has clarified that while expressing the opinion, the muddamal bullet and test fire bullets were compared class characteristic-wise and individual characteristic were also examined. It is rightly said by this expert that while doing comparison, the similarity as well as dissimilarity both are focussed and in the present case, no need had cropped up to notice dis-similarity and, therefore, there was no need to overlook the element of dissimilarity found. It appears from the evidence that the class characteristics were examined in detail and there is detailed cross-examination on this aspect of PW.4 Mr. Modi in paras 13, 14 & 15 of the cross-examination of the witness made on 04.05.2002 by the learned defence counsel. It is true that the evidence given by Mr. Modi- Ballistic Expert, is after all an opinion evidence and that by itself the opinion evidence should not be given weightage more than required, is the settled legal position. In appreciating the evidence led by the prosecution, the efforts made by

the expert and finding recorded at the end of analysis-examination, if are useful to the Court in finding out the truth, then such opinion evidence automatically assumes great importance. Though the panchas of recovery of muddamal Revolver and used cartridges have not fully supported the case of the prosecution, when the ownership of the muddamal weapon is not a matter of dispute and the place from which it is recovered and the person who handed over these muddamal articles to police in recovery operation is not in dispute, planting of these muddamal articles to implicate the accused, is ruled out and the very muddamal was compared by the expert Mr. Modi and he has recorded the finding that the bullet mark-"F" possibly was fired from the muddamal Revolver of Accused No.1. At one point of time, after re-calling of Mr. Modi, an attempt was made from the defence side to allege that some writings have been added in the worksheet prepared by this expert and that too after recording of his evidence during the trial on earlier occasion. Our attention was drawn to the said writings allegedly inserted subsequently in column No.1. We have carefully perused the original worksheet brought by this witness and tendered in evidence and there is no breach in the sequence and we are not convinced with the suggestion made to this witness that he, with a view to help the prosecution or otherwise, had added something in the original worksheet. On the contrary, the worksheet

tendered in evidence has made the evidence of Mr. Modi more trustworthy and discloses the meticulousness that he must have followed at the time of carrying out the examination-analysis of muddamal articles sent to him in Ballistic Department of FSL. It was not suggested to this witness either by the prosecution or by the defence counsel that he had noticed any presence of the blood when the bullet was placed at comparison microscope. The defence of replacement of the bullet was brought for the first time before the Court during the course of cross-examination of the expert Mr.Modi and while making the suggestions to Dr.Bhise. So, after the examination of number of witnesses or in the midst of the trial, whether the bullet could have been sent for serological examination by the ld. Presiding Judge of the Court ? is the question and our answer obviously is in the negative because the Court should not try to assume the role of Investigating Agency and any evidence either positive or negative possibly should be viewed with a great doubt. In such a situation, according to us, the prosecution has satisfactorily established one fact that the muddamal bullet taken out from the body was sealed by the responsible panel of doctors and that has reached in a sealed condition with a specimen seal to FSL and ultimately it is found by the expert that the bullet possibly was fired from the muddamal Revolver and three used cartridges are also the cartridges fired from the

very muddamal Revolver. The lethargy or negligence on the part of the Investigating Agency is also emerging because it was possible for the agency to trace out the purchase of ammunition under the licence and use of each cartridges by the licence holder i.e. convict accused during interrogation and liking evidence could have been collected from the authorized dealer because the each licence holder of a fire arm is supposed to explain the account on asking by the competent authority as to the purchase and use of each cartridge.

33. The conflict or confusion that has come on record, if considered,is mainly on account of the description of the bullet given by doctor in the post mortm notes and the answers given by Dr. Bhise in the cross-examination as to the measurement of the bullet taken out by the panel of doctors after taking out the same from the body of the deceased. Nothing has come on record through any of these two experts viz. Dr. Bhise and Mr. Modi that whether any bullet of the measurement shown in the post mortem note, if fired through 0.22 Calliber Revolver or Pistol, could travel within the body of a healthy able-bodied man as found in the present case while performing the post-mortem. The details are given herein above that from where the bullet was taken out from the body of the deceased Arvindbhai and the areas through which it reached to the place from where it was found lying in the

body and taken out. In the same way, it is also not in evidence of these two witnesses that a bullet which can be fired from muddamal Revolver from a short range would cause exit wound or not. So, when it is the case of the prosecution that the deceased succumbed to the injuries caused by the use of muddamal fire arm and that too by the bullet mark-"F" and the defence plea is that by misusing the licence and weapon of convict accused, the Investigating Agency by tempering with muddamal bullet had implicated the accused falsely in the crime and there is no evidence of cogent nature that the incident had ever occurred in the farm or at the border of the farm divided amongst the deceased and accused No.1 and visit of convict accused at Prerana Hospital even if it is held to be proved by satisfactory evidence, that circumstance would not go against the accused because he being a father, might have gone visited immediately on receipt of the information of causing of grave injury to his son. Deceased Arvindbhai was not his enemy. For the sake of arguments it is accepted that the deceased Arvindbhai had developed some inimical feelings and both the deceased and convict accused had equal ill-feelings on the issue of division of the properties, then also, the presence of the convict accused in Prerana Hospital can not be said to be inconsistent to his innocence. We are not convinced with the backbone of the defence theory while appreciating the strength of the case of the

prosecution that unless the Court is able to accept that as Amrutbhai- convict accused was there in Prerana Hospital when complainant Artiben had seen him in Prerana Hospital with her two brother-in-laws, one younger brother and another the husband of her sister-in-law, she might have decided to implicate accused No.1 in the crime on account of ill-feeling or any other grievance like her deceased husband had against convict accused, she might have named the convict as an accused to the police officer on presumption or assumption that nobody else than the convict could have caused this injury because he is the person with whom the dispute had cropped up on the decision of the convict accused to erect the dividing wall between two parcels of land of Shantivan Farm divided along with family business amongst them and the police thereafter to substantiate the complaint and without resorting to the real culprits, arraigned all the three persons as an accused. The police might have considered number of injuries other than the bullet injuries found on the body of deceased Arvindbhai. But as discussed earlier, the evidence as to the presence of all the three accused including the convict accused at Prerana Hospital is not found a mere presence. There is sufficient evidence of convincing nature that the deceased was brought in the red colour maruti car belonging to the accused persons. Thereafter, the convict accused was also seen in Prerana Hospital in couple of

minutes by PW Artiben and two other prosecution witnesses namely father and brother of PW Artiben. The presence of the convict accused in Prerana Hospital is corroborated by the police witness also as he was taken from Prerana Hospital to Karnavati Hospital under a police escort. In this background of the evidence given by PW Artiben and other witnesses and the conduct of the convict accused thereafter, leaving the dead body of his own young son and in surreptitious manner under the pretext of some old ailment and getting admitted in a hospital at a distance, if considered, then the description given by the panel of doctors as to the measurements of bullet being opinion evidence, is not required to be given any weightage. According to us, he ballistic expert who had examined the bullet and opined as to its nature, size and possibility of it's fire through the muddamal weapon, of course is a opinion evidence. The expert witness, as per the settled legal position, can be divided in different classes and they can be divided in to two different categories. The first category of such witnesses are those who have some personal knowledge of the fact and the second category is of those who have no such personal knowledge in the subject. Mr. Modi is examined and his evidence has been viewed by the ld. Trial Judge as a corroborative piece of evidence. So, the panel of doctors can not be equated with Mr. Modi who is an expert in the subject so far as the fire arm and ammunition is

concerned. Dr. Bhise was called and examined as an expert to assist the Court, is not a witness of fact and his evidence as Forensic Science Expert and Medical Officer is really of an advisory character given on the basis of the symptoms found on examination as to the nature of injuries found on the body of the person deceased while performing autopsy, as to the time of death and cause of the death. It is expected that the expert witness puts all the material inclusive of the data which induced him to come to a conclusion regarding the symptoms found and the cause of death recorded in post mortem notes. It has become a matter of common observation that not only the honest opinion of different experts be obtained upon the opposite side of the same question, but when two honest looking opinion of different experts are placed before the Court, then the Courts are supposed to draw a distinction between the two. It is true that one of the backbone of the arguments of Mr. Thakkar is that the details given by the panel of doctors in post-mortem notes regarding the measurement of bullet by drawing picture and that too by using the scale, is the data and conflicts of data of two experts brought on record has created a shadow of doubt and, therefore, the finding of the trial Court should be reversed saying that the deceased might not have succumbed to the injuries caused by bullet fired from the muddamal Revolver and it may be by other weapon and other bullet. But when it comes to

circumstantial evidence, the Court is supposed to see the totality and collective impact of the circumstance emerging from the evidence led by the prosecution. In the background of the opinion evidence given by Dr. Bhise and Mr. Modi vis-a-vis the documents proved by them, the Court shall have to draw a distinction, if possible, qua the conflict as to the measurements of bullet as significant. According to us, the opinion expressed by Mr. Modi is based on scientific facts and it is not a matter of mere opinion because he is the person expert in the subject and when he was asked to bring the examination- worksheet, he had strengthened his trustworthiness by bringing it and proving it to the satisfaction of the Court. So far as the measurements of bullet in post mortem notes shown by the Doctor are concerned, in our opinion, the same is a matter of opinion on observation. As medical expert, the opinion of Dr.Bhise through which he has established certain medical facts, can not be said to be a mere matter of opinion. On certain facts as stated by Dr. Bhise, any other medical expert would hardly dis-agree. But in a province of mere opinion, it is experienced by our Courts that the experts differ widely amongst themselves. The exercise of taking measurement of bullet or classifying it during the course of performance of the post-mortem, would fall in the area of mere opinion. At the bottom of page-6 of the post-mortem note, there is a column wherein panel of doctors

were supposed to quote number of bullets and it was not required to draw a sketch of a bullet in the margin though there is reference of exact measurement of bullet in the notes (A),(B) & (C) mentioned in this column of additional remarks. According to us, the opinion of the panel of doctors that the range of firing “seems to be within a close range of more than one foot” as evident from the post-mortem notes, is an expert opinion as Medical Officer and Forensic Medicine Expert, but in absence of opinion which can be said to be convincing and to the satisfaction of the Court that the muddamal bullet mark-”F” could not have been entered into the body of the person deceased through the wound, the opinion of Mr. Modi is found to be more objective on the issue. Therefore, on this count, we are of the view that in the present case, the prosecution has satisfactorily established beyond doubt that the deceased had succumbed to the injuries by the muddamal article bullet mark-”F” and that bullet possibly was fired from the muddamal weapon viz. Revolver recovered from the residence of convict accused at the instance of the wife of the convict accused. The ld. Trial Judge has rightly considered the point of identity of muddamal weapon keeping in mind the details mentioned in the licence to hold the fire arm and the number of fire arm.

34. We have considered the version of Ballistic Expert

Mr. Modi (exh.16 of his deposition) in reference to the worksheet produced by this witness and the opinion expressed by this expert only would loose its weight and importance if it is possible to form an opinion that the parcel of the bullet mark-"F" was not properly sealed or if sealing process is doubtful and there was scope for police to temper with that parcel mark-"F" and to re-fix the seal of department of Forensic Medicine of VS Hospital. As we have no reasons to doubt or to infer such a tempering for want of clinching circumstance because as per the settled legal position, the discrepancy can be given proper weightage, but no undue weightage or importance to the discrepancy should be given. Of course, the facts of the case before the Apex Court were different, but the observations of the Apex Court in the case of **Aher Pithia Vajshi and Others v/s State of Gujarat, 1983 Cr.LJ (SC) 1049 (= AIR 1983 SC 599),** helps the prosecution in the present case. The Apex Court has said thus:-

> "5. P. W. 4 Ram Jiva, the father of Nabha Ram, had witnessed the entire incident. The evidence of P. W. 4 has been disbelieved by the learned Sessions Judge in the context of trivial discrepancies and on the basis of conjectures. So also the evidence of P. W. 3 Bhimsi Kala who had arrived at the scene just after Nabha was dragged inside the Deli and had heard the

shots of Nabha when he was being assaulted inside, and had identified the appellants as the persons who had thrown out Nabha after the assault, was also disbelieved in the context of trivial discrepancies and on the basis of conjectures. Similarly the evidence of P. W. 6 Mulu Dhana and P. W. 11 Dhana Bhimsi who had witnessed a part of the incident till the point of time when Nabha was being assaulted on the same ground was disbelieved on flimsy grounds. The High Court has examined the entire evidence closely and thoroughly and has answered satisfactorily every point of criticism. In our opinion the High Court was perfectly justified in taking the view that the assessment made by the learned Sessions Judge was altogether unreasonable. And in concluding that the evidence of the prosecution witnesses was satisfactory and enough to warrant a finding that the appellants were the assailants who had assaulted Nabha Ram. Learned counsel for the appellants laid great stress on the circumstance that it was a dark night and the assault took place at about 9 p.m. Evidence of P. W. 4, P. W. 6, P. W. 11 and P. W. 3 whose evidence has been accepted is unanimous on the point that P. W. 4 Ram Jiva, father of the victim, had a torch in his hand and the assailants could be identified when he flashed the torch light at the relevant time, There

is no good or valid reason to disbelieve the evidence of the witness on this point. What is more the presence of blood-stains on the cart which was lying in the court-yard and presence of the blood-stains outside the Deli fully corroborate the version that the incident occurred in the manner narrated by the prosecution witnesses. Ram Jiva being the father of the victim was not interested in implicating persons other than the real culprits. His evidence has unhesitatingly and for good reasons been accepted by the High Court. And we see no reason to take a different view. We are fully satisfied that the assessment made by the learned Sessions Judge was so unreasonable that the High Court was justified in making its own assessment. What is more the evidence of P. W. 3 Bhimsi Kala is of considerable importance. He has his house in the neighbourhood. There is no reason to disbelieve his evidence that he had arrived at the point of time when the Deli was closed after Nabha was dragged inside. And that he had heard Nabha shouting for help. He has also identified the appellants as the persons who had thrown out Nabha in an injured condition after the doors of the Deli were opened. The evidence of P. W. 6 Mulu Dhana and P. W. 11 Dhana Bhimsi has been mainly criticized on the ground that they were just chance witnesses. It is however difficult to conceive as to why any of them

should falsely implicate the appellants. Their evidence has been thoroughly and carefully scrutinized by the High Court and found worthy of acceptance. We see no reason to do otherwise. Counsel for the appellants has contended that the prosecution witnesses had invented the version that he was dragged inside the Deli and assaulted inside. This argument does not pass the test of probabilities. There were bloodstains inside the Deli of the appellants and also on the cart which was lying in the court-yard as revealed by evidence. The Panchanama further shows that attempts were also made to clean the door and remove the blood-stains. The fact that blood-stains were found inside the Deli leads to the inference that the assault must have been made inside the Deli. Since blood-stains were found both inside and outside the Deli the version that he was assaulted inside and thereafter thrown outside the Deli is probabilized, for, the assailants would not have wanted the dead body to remain inside the Deli. On going through the Judgments of the Sessions Court as well as High Court and the evidence on record we are of the view that the High Court was perfectly justified in characterizing the assessment made by the learned Sessions Judge as unreasonable and in appreciating the evidence on its own, inasmuch as the Sessions Judge had attached undue importance

to minor discrepancies and had made a suspicious approach to the evidence of the witnesses by resorting to conjectures.

In the same way, it is not possible for us to give any weightage to the arguments developed on the point that Ballistic Expert had not taken the photographs and they were not tendered before the Court in support of the opinion expressed because absence of such photographs only, in the present case, would have become a matter of prejudice if the photographs of the bullet would have been taken by the doctors while sealing the bullet while taking out from the body. The observations made by the Apex Court in the case of **Ramnathan v/s State of Tamil Nadu, 1978 SC 1204,** is proper answer to the arguments advanced on this point. (Relevant paras 25 & 26).

35. The assertion made by PW Artiben in her complaint given to PSI of Sarkhej Police station, whether can be said to be a delayed disclosure of the name of the accused and mainly of convict accused, is also an issue which needs consideration because delay in lodging the complaint in number of cases has been considered adversely to the prosecution because it gives ample scope to develop the version to the complainant and to arraign a person as accused keeping curtain on the exact sequence of events leading to the commission of a cognizable

offence. The case of the prosecution is that the version of the father and brother of the complainant Artiben before the police and during the trial, is that none of these two had attempted to give details of events, though probably they were knowing and this inaction on the part of the father of the complainant namely PW 21 Bharatbhai Patel has raised a shadow of doubt otherwise it was the first opportunity to this witness for giving the complaint to Ellisbridge Police Station. It emerges from the evidence that before leaving Prerana Hospital for going to Ellisbridge Police Station, PW 21 Bharatbhai was knowing or must be knowing the gist of the crime committed against his son-in-law Arvindbhai. An anxious father-in-law interested in the protection and welfare of his daughter Artiben, would not have left any stone unturned in getting the complaint registered with Ellisbridge Police Station. We have considered the relevant entry and some part of the evidence in this regard mentioned while referring the arguments of ld. Sr.Counsel Mr. Thakkar. The complainant PW Artiben had met Rahul- her real brother PW 20 for the first time when Rahul reached to the bungalow of complainant Artiben and at that time, she had seen Artiben crying. Thereafter, Artiben had boarded the car immediately. At that time, as per the say of PW 20 Rahul, PW Artiben had simply informed him that Arvind had sustained bullet injury and on asking, she had replied that he has been

taken to Prerana Hospital. She had also disclosed that she had received this message on telephone from the driver and convict accused had caused injuries to him. The conduct of PW Artiben is found natural. One would start crying on seeing the inmates and she had disclosed the name of the convict as the person responsible for the bullet injury caused to her husband. The crucial question is that non-disclosure of these facts by Rahul to police or in turn by Bharatbhai to Ellisbridge Police, whether would be viewed with doubt, is the question. Failure of either to give details to Ellisbridge Police or of Ellisbridge police in recording the details of the facts stated by the father of the complainant namely Bharatbhai after reaching to Ellisbridge police station, whether would make a case of the prosecution doubtful and language of the entry found in Ellisbridge Police Station or Sarkhej Police Station would cut the sanctity and the strength of the complaint given by PW Artiben, are various questions need evaluation and appreciation. In our view, the ld. Trial Judge has made all good reasonable efforts in appreciating this part of evidence and the ultimate finding recorded on the point, in our view, does not appear to be based on perversity or illegality as argued by Mr. Thakkar. The evidence of PW 21 Bharatbhai is that after about half an hour of leaving his son Rahul and daughter-in-law Shital at the residence of PW Artiben, he had received a telephonic call from his

son Rahul and he was informed that Arvindbhai and his father had quarreled and the father of the Arvindbhai has caused the bullet injury to Arvindbhai and that he should come immediately. On asking, he was informed that they are in Prerana Hospital. Thereafter, he had left with his wife to Doctor House for Prerana Hospital and he had met his son Rahul at the door of Prerana Hospital. He was taken to Intensive Care Unit (ICU for short) and injured Arvindbhai was lying on a bad and Artiben was standing nearby and was crying. This witness had waited in the hospital for about 10 minutes. He had given solace to PW Artiben and thereafter he had gone to Ellisbridge Police Station to call the police. In the examination-in-chief, he has stated that he had gone to Ellisbridge Police Station to call the police personnels and his younger son Rahulbhai had accompanied him. As he was there in the hospital, he was asked to accompany him. On reaching to Ellisbridge Police Station, he had asked the police to come with him saying that his son-in-law has sustained bullet injuries. He was asked by the police as to where the injured is kept and in reply thereto, he said that the injured is at Doctor House in Prerana Hospital. Thereafter, PW Bharatbhai had reached Prerana Hospital with police and police had seen the body of Arvindbhai and had talked with complainant Artiben. Thereafter, the police went out of ICU and talked with the convict accused. Sarkhej Police Station was informed

and thereafter on arrival of Sarkhej police, complaint of PW Artiben was recorded. The body of Arvindbhai was taken to VS Hospital for post-mortem examination and other formalities at about 6.15 p.m. This witness has been cross-examined in detail on behalf of the convict accused. The questions asked and recorded in paras 5, 6 & 7 are mainly the questions in reference to the business, properties and their management and we have dealt with this part of evidence while dealing with the financial strength of the family of the deceased and the accused and the point of motive impliedly found, in earlier part of the judgment. The evidence on the point of disclosure of the name of the convict accused by complainant Artiben to her brother Rahul and to PW Bharatbhai is consistent. It is stated by Rahulbhai that after reaching Prerana Hospital, he had telephoned his father and informed him about the incident. In examination-in-chief, PW Rahul has stated that “when we all the three reached Prerana Hospital, at that time, accused Nos. 2 & 3 were taking out Arvindbhai from their read coloured maruti car and Arvindbhai was taken to the fourth floor i.e. in Prerana Hospital. In the lift, he himself, his brother Chirag, sister Artiben and accused Nos. 2 & 3 were there and accused Virendra had some talk with doctor and Arvindbhai was taken to ICU. After examining Arvindbhai, the doctor had declared him dead. Thereafter, he had telephoned his father and after some

time, his father i.e. PW Bharatbhai had reached Prerana Hospital. After staying for some time in the hospital, Bharatbhai and Chirag had left for Ellisbridge Police Station to inform the police. This evidence has been tested on cross-examination and we do not find any material contradiction. Of course, this witness has answered certain questions in vague manner and his tendency while answering the questions asked during the course of cross-examination is found either negative or irresponsive and, therefore, he has answered most of the relevant questions as if he does not recollect as to what had actually happened. He may be telling truth also. Number of persons are not capable of remembering sequences of the conversation so that they can be produced verbatim before the police and also before the Court. So, we are not impressed by the arguments that this tendency makes this witness unreliable. The evidence of the witness has to be read as a whole and if need be, the Court while scanning the evidence of the witness, should try to seek ample corroboration from other evidence led by the prosecution. Here, the version of Rahulbhai is amply corroborated by Artiben through her conduct and PW Bharatbhai through his deposition. Merely because Rahulbhai is not able to reproduce the words told by his father, the say of PW Bharatbhai should not be viewed with doubt. PW Bharatbhai is also an independent competent witness and his evidence needs appreciation

separately and independently. WE do not find any material conflict as to the conversation that has taken place between Rahulbhai and Bhratbhai before Rahulbhai left the bungalow on telephone call of complainant Arbitben and thereafter the contents of the telephone conversation that had taken place between these two witnesses. As per the sequence of events placed by the prosecution while unfolding the story, the evidence of these two witnesses satisfactorily corroborates each other and in turn corroborates complainant Artiben that she had disclosed the name of the victim accused immediately to Rahulbhai after receipt of the telephone call from the driver who had informed her from Shantivan farm. Therefore, this is a case where the Ellisbridge police could have the detailed complaint of either Bharatbhai or Artiben immediately after reaching Prerana Hospital and could have registered FIR by giving “O” number as per the practice normally followed by the police stations in the State of Gujarat. But, it appears from the evidence of PW Bharatbhai that he must have insisted that police should immediately accompany him to Prerana Hospital. The Court should consider the mental state of a person who had received the news of the death of his young son-in-law and that too at the hands of his father. His version is that he talked with police. He was not conscious about the status of the officer. He had also shown his ignorance whether anything was formally written by the

Ellisbridge police before they left for Prerana Hospital from Ellisbridge Police Station. This witness was informed by Ellisbridge Police that they should go to Prerana Hospital and they (police personnel) are following them in a police van. He was not even able to re-collect whether he had entered in the chamber of a Police Inspector or Police Sub Inspector. He talked with police, but they are not in separate chamber. Two to three police personnels were sitting there. Thereafter, he had not discussed with police prior to their arrival at Prerana Hospital and he had answered all the questions asked by the police regarding the facts known to him. This witness has denied the suggestion that when he was asked the questions by Ellisbridge Police that when quarrel had occurred, he had responded that he does not know. On the contrary, the cross-examination of this witness gives a clear impression that he had told the basic facts; viz

(i)he had come to the police station to call the police and asked the police to accompany him;

(ii)he was there in the police station because his son-in-law has sustained bullet injury in a quarrel;

(iii)that his son-in-law Arvindbhai is in Prerana Hospital in Doctor House, Nr. Parimal Garden Railway Crossing.

It is clear from the evidence of PW Bharatbhai that he was in tension. He was not even able to recollect whether the police personnel with whom he had conversation in Ellisbridge police station, had come to Prerana Hospital or not. He had followed the police instructions to go back to Prerana Hospital on the assurance given by police and that they are following him immediately in a separate police van. However, he has denied categorically in response to the direct question and impliedly while giving details of the facts within his knowledge, that he was not given name of the convict accused as a person responsible for the bullet injury caused to Arvindbhai. Whether the Court can expect each word of conversation that might have taken place between all the three witnesses verbatim or should try to assess the totality of the events that had occurred in initial minutes or hours as unfolded by them? In our view, the Court should look at the basic substance told by each witness keeping the reliability question in mind of each individual witness. So, the arguments focussed mainly on the language of Entry No.12 -Exh.104 & 105 (= Exh.107), by itself would not destroy the sanctity of the complaint given by PW Artiben to PSI Mer of Sarkhej Police Station because the entries, on plain reading, did disclose that some cognizable offence has taken place, but they are of cryptic nature and mainly entry No.12 is of a cryptic nature. It is clear from the

deposition of PSI Bodar and PW 25 Mahendrakumar Prajapati who was in the investigating squad of Ellisbridge police station that they had failed in performing their crucial duties as police officials and all reasonable attempts appear to have been made by these two witnesses to see that the maximum infirmities occur so that the prosecution suffers. WE are able to notice many aspects from which it is possible to infer that both these police officials can be said to be responsible for dereliction in discharging their duties. It is not disputed that Ellisbridge police had reached Prerana Hospital and it is in evidence of these two witnesses that the Ellisbridge police had reached Prerana Hospital on account of the information given by two persons who had been to the police station. Even then, Ellisbridge police has not entered the names of the persons visiting the police station and informing about the commission of a cognizable wrong. It is, therefore, argued on behalf of the accused that Ellisbridge police deliberately suppressed the details that probably were given by PW Bharatbhai to the officer who was present in the police station and to whom PW Bharatbhai had a conversation. When PSI Mr. Bodar was the first officer to reach Prerana Hospital from Ellisbridge police station with his assistants, he ought to have mentioned in the police station diary of Ellisbridge Police Station as to how and why he is leaving Ellisbridge police station for

Prerana Hospital. It is in evidence that after reaching Prerana Hospital, PSI Mr. Bodar had entered the room where the body of Arvindbhai was lying and the complainant Amrutbhai was present. At that time, complainant Artiben, on being asked, had informed that her husband has been killed by her father-in-law Armrutbhai i.e. convict accused by causing bullet injury. He had also inquired about the place and complainant Artiben had informed that the incident had occurred in the sim of village Makaraba in Shantivan Farm. He was also informed by her that her father-in-law Amrutbhai i.e. the person accused of the crime is present in the hospital. PSI Mr. Bodar found out that person and he had also questioned him. Even if inadmissible part of the evidence of examination-in-chief of PSI Bodar is ignored, it is clear that PSI Bodar could have informed his police forthwith either by returning to the police station in person or telephonically to make a detailed entry. At one place, in the cross-examination of accused No.1, this witness has given an irresponsible answer saying that the police is not supposed to write the information given by an individual. This question was asked in reference to the disclosure of a cognizable offence and that too of a serious nature meaning thereby that the occurance of some serious incident was brought to the notice of this witness and who has decided to left the police station for Prerana Hospital firstly to

ascertain the truth disclosed by the informant who had come to the police station. But when certain facts were gathered by PSI Bodar from Artiben i.e. wife of the injured-deceased Arvindbhai, who prevented him in informing his police station that there is truth in the information given by the visitor-informant and necessary entry be made in the police station record and in turn the Sarkhej Police Station may kindly be informed. Perhaps, this is the first case wherein the Ellisbridge Police i.e. PSI Mr. Bodar and PW Police Constable Mahendrakumar Prajapati say that there was a telephonic conversation between these two witnesses and that conversation was written on a plain paper by PC Mahendrakumar Prajapati and those exact words were informed and dictated by this PC Mahendrakumar Prajapati to his police officer sitting in the Ellisbridge Police Station on telephone. Plain reading of cross-examination of PSI Mr. Bodar, on the contrary, gives an impression that the material facts were suppressed at initial stage by Ellisbridge Police namely by these two witnesses for the reasons best known to them and not by the complainant Artiben. There are material conflicts in the version of these two police witnesses qua the sequence of time and conversation that had taken place between Bharatbhai and the police officer with whom Bharatbhai had some conversation in Ellisbridge police station and subsequent events that brought PSI Mer of Sarkhej Police

Station to Prerana Hospital. It is possible for the defence to argue that this infirmity affects adversely to the reliability of PW Artiben as well as Bhratbhai and PW Rahulbhai i.e. all the three witnesses and it also creates a shadow of doubt that the Ellisbridge police, though there was ample opportunity, was not informed about the details of the incident and none of these three witnesses were even knowing that how, when and why the deceased sustained bullet injury. One fact, practically has come on record in a convincing manner that accused Nos. 2 & 3 were seen taking out from their red coloured Maruti car injured Arvindbhai and PW Artiben as well as PW Rahul were with accused Nos. 2 & 3 in the lift whereby Arvindbhai was taken to Prerana Hospital at fourth Floor of Doctor House. On one hand, the defence has tried to bring one aspect as part of evidence that as such there was no animosity between Artiben and her family on one side and family of the convict accused or family of other two accused. Of course, a suggestion made by ld. Counsel to a prosecution witness is not binding to the accused, but if really there were no inimical terms of serious nature, then whether it was possible of that no conversation all throughout between Artiben and her real brother-in-law who were there in the hospital till the time PSI Mr. Bodar of Ellisbridge Police Station reached Prerana Hospital would be there, would be a question. At one

place, PW Mahendrakumar Prajapati has dared to give an answer to the effect that PSI Mr. Bodar had told him that he is not aware about the details of the incident and he is not able to give it because "nobody is there". It appears that both these police witnesses have uttered a "lie" in a planned manner so that they can escape conveniently from the impeachment or hostility and criticism from the Court and simultaneously can help a party of their choice. In our view, it will be just and proper to quote relevant para-31 of the decision in the case of **State of Punjab v/s Baldelv Singh, AIR 1993(3) GLR 2483:**

> "31. There is indeed a need to protect Society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the officials concerned so that the laxity on the part of the investigating authority is curbed."

It would be appropriate for us to make necessary

comments in this regard at an appropriate time in subsequent paras of the judgment and if need be, we can make necessary observations. At this stage, when we are evaluating the evidence and submission made on behalf of the convict, it is sufficient to say that the entry exh.104 found in the register of Sarkhej Police Station is of a cryptic nature. Merely because it was possible to make detailed entry in Ellisbridge Police Station or it was possible for Ellisbridge Police officials to inform the Sarkhej Police with some detailed information, would not make entry No.12 of Sarkhej Police Station “FIR” within the meaning of section 154 of CrPC. It is not the say of PSI Mr. Bodar that PW Artiben had not disclosed the name of the accused initially when he met her for the first time in Prerana Hospital, nor she had disclosed the name of the place of incident. This aspect viz. non-saying by PSI Mr. Bodar as aforesaid has been examined by the trial Court while evaluating the total evidence and it is possible for this Court to separate the grains from chef. If it is possible for the Court to do this exercise when it comes to the entire set of evidence or evaluation of the evidence of an individual witness, then the Court should do that exercise because ultimately the criminal trial is a fact finding machine and the duty of the Court is to see that without loosing balance, the Court is able to reach a just,proper and legal finding. Both these witnesses i.e. PSI Mr. Bodar and PW

Mahendrakumar Prajapati- a police constable were re-called by the Court and there is detailed examination of these two witnesses. PSI Mr. Bodar when has said that he was informed about the details of the incident when he reached Prerana Hospital and asked the complainant when she was sitting near the body of Arvindbhai, there was no reason for him to ask PW Mahendrakumar Prajapati to inform Sarkhej Police station in the manner in which PC Mahendrakumar Prajapati had informed. Exh.104 reveals the name of one PC Mahendrakumar and the person who claims to have given details to Sarkhej Police station is Mahendrakumar Prajapati. It appears that either Mahendrakumar Prajapati has not even disclosed the correct name so if need be he can escape from the responsibility of even making telephone call from the police station saying that he is not the PC Mahendrakumar Prajapati or it was the Sarkhej police who had not even cared to know the correct name of the informant talking on telephone at the other end i.e. Mahendrakumar Prajapati. Normally, it is the practice of each police station to record buckle number of the police constables who are carrying crucial messages or are entrusted with valuable articles or are giving any crucial sensitive information to the police station. It appears that while making entry No.104, care was not taken by PSO of Sarkhej Police Station or the informant Mahendrakumar Prajapati had failed in telling his buckle number to PSO of

Sarkhej Police Station while giving Vardhi at 16.15 hours. The entry did disclose the place of incident. Who told Mahendrakumar Prajapati about the place of incident and when?; When there was no reason to suppress the name of the deceased, even then why “one person” is mentioned? On arrival when Arvindbhai was declared dead, then why Sarkhej Police Station was not informed about the fact of death? are the questions. The plain reading of the entry would give an impression that one injured person has been brought to the hospital and some incident of firing has taken place at Shantivan farm. As if the Ellisbridge Police Station Officer is superior to the person in charge of Sarkhej Police Station, a direction was given by the Ellisbridge Police to Sarkhej Police that they should inquire from Shantivan Farm. The person injured was brought within Ellisbridge Police Station. When it is claimed by PSI Mr. Bodar that he had arranged to see that Sarkhej Police reaches Prerana Hospital, then why such a direction was given by Ellisbridge Police to Sarkhej police is also not answered either by PSI Mr. Bodar or by PSI Mr. Mer. So, it is possible for us to separate the grains from the chef brought by the police witnesses in the court room by their half-hearted evidence.

36. It is clear from the evidence of PW Bharatbhai that he had left Prerana Hospital for Ellisbridge Police

Station to call the police so that the police can come down to Prerana Hospital at the earliest and it is also in evidence that he had insisted that the police should accompany him, but he was asked to go to Prerana Hospital on assurance that police will follow him in a separate police van and that did happen. What was required to be done by Ellisbridge Police is one aspect and what actually was done by police is altogether a different aspect. The defence side has attempted to show the probability that police must have written something and, therefore only in record from Ellisbridge Police Station in the nature of FIR Book or original station diary of relevant date , have not been brought before the Court and thereby the prosecution is trying to put curtain on the facts that must have been stated by PW Bharatbhai to the police otherwise the language of entry No.104 would be materially different. But, it is clear even after the cross-examination of PSI Mr. Bodar and PW Mahendrakumar Prajapati that the first entry No.104 (= 107), is not the entry made on the strength of any vardhi sent by PC Mahendrakumar Prajapati prior to receipt of telephone message from PSI Mr. Bodar after reaching to Prerana Hospital. On the contrary, the evidence of these two witnesses and the time of entry clearly indicates that this entry of Sarkhej Police Station has been made on the strength of the telephonic message sent by PSI Mr. Bodar from Prerana Hospital to Ellisbridge Police

Station and the information given by PC Mahendrakumar Prajapati. No entry in Sarkhej Police Station has come on record showing the departure of PSI Mr. Mer from Sarkhej Police Station to Shantivan Farm or its return to Sarkhej Police Station from Shantivan Farm. PSI Mr. Mer has stated that he had been to Shantivan Farm and he had learnt about some quarrel between the father and son. This part of his version can be said to be hear-say, but the evidence as to his visit to Shantivan Farm is a substantive piece of evidence and there is no negative entry in the Sarkhej Police Station that the information received by Sarkhej Police Station about the incident of firing in Shantivan Farm is either incorrect or exaggerated and, therefore, nothing is required to be done. On the contrary, Sarkhej Police Station received second message at about 17.15 hours. When the evidence of PW Artiben is found reliable that she had replied the questions asked by PSI Mr. Bodar in a particular manner and she had no reason to put curtain on the facts learnt by her on telephonic message -information received by her through her driver from Shantivan Farm, then there was no reason for PSI Mr. Bodar to dictate any details contrary to the facts learnt by him. PSI Mr. Bodar has tried to say that he had not made any detailed inquiry from PW Artiben after reaching to Prerana Hospital, but on the other hand, he had stated clearly even during the course of the cross-examination that PW Artiben had told him in

brief about the place of incident and the involvement of her father-in-law Amrutbhai and PSI Mr. Bodar has denied the suggestion that PW Artiben has not disclosed the name of the convict. The conduct of PSI Mr. Bodar is never found of an Investigating Officer and it is in evidence that after coming out of ICU, he had also talked with the convict accused Amrutbhai who was present in Prerana Hospital and the telephonic message if was really made by PSI Mr. Bodar to PC Mahendrakumar Prajapati, then it is inferrable that it must be after the conversation with convict Amrutbhai. It is not in evidence that before asking any question to convict accused, he had sent a message to his police station on telephone, otherwise that fact could have been there in evidence. It is not the say of either PSI Mr. Bodar or PC Mr. Mahendrakumar Prajapati that the Ellisbridge Police Station got message through wireless otherwise the control room could have come in picture. So, the telephone must have been made from Prerana Hospital. There is no consistency in the evidence of PC Mahendrakumar Prajapati and PSI Mr. Bodar as to the exact words of communication that had taken place between PSI Mr. Bodar and PC Mr. Mahendrakumar Prajapati at first instance. On the contrary, a flash of evidence that has come on record during the course of cross-examination of PC Mr. Mahendrakumar Prajapati indicates that once during crucial initial minutes, this very PC Mr. Mahendrakumar Prajapati was present in

Prerana Hospital. Of course, it is being unexplained that initially PC Mahendrakumar Prajapati was there at Ellisbridge Police Station and after about half an hour, PSI Bodar had been to Ellisbridge Police Station for arrangement of more police force and at that time, this Mahendrakumar Prajapati was asked to go to Prerana Hospital and from there he went with convict accused to Karnavati Hospital in the escort -surveillance team. We are conscious that any inference drawn about the possibility of telephone call made to Sarkhej Police station from Prerana Hospital itself, can be branded as conjecture, but without entering into this aspect, it is clear that the first message sent not only appears of cryptic nature, but there are circumstances to show that the details of that message were substantially incomplete or incorrect. So, even though PSI Mr. Bodar was authorized to undertake the investigation by recording FIR and thereafter handing over those papers to concerned authorized police station, in-action on the part of PSI Mr. Bodar or negligence shown by him would not adversely affect the sanctity of the complaint of PW Artiben given to PSI Mr. Mer at Prerana Hospital as FIR within the meaning of section 154 of CrPC. It is difficult to accept that for want of any evidence or speaking circumstance, the complaint produced before the Court in the present case given by PW Artiben, has been written down at some other place than Prerana Hospital. It is in evidence

that about 6.00 p.m. or so, the process of shifting of the body of Arvindbhai to VS Hospital for legal formalities had begun and prior thereto, PSI Mer had already reached Prerana Hospital on receipt of the second Vardhi received by his Police Station. The genuineness of this very entry and the time mentioned in the entry has been seriously questioned and it is argued by showing the original entry that this entry is ante-timed and therefore only there were erasers of signature of the person who had made the entry in view of the duty hours. No documents from the police control has been made the part of the papers of investigation, but the second entry of 17.10 hours discloses the basic facts in brief. These details, as per the evidence of PSI Mr. Bodar, are the information given by him to police control because he has stated so in his deposition. If nothing adverse was disclosed against Amrutbhai-convict accused, there was no need for the convict accused to get permission of Dr. RK Patel for leaving Prerana Hospital to any other hospital because according to Mr. Bodar, the convict accused has sought permission of Dr. RK Patel. In absence of evidence of Dr. RK Patel, the conversation that had taken place between the convict and Dr. RK Patel can not be looked into by us, but the say of PSI Mr. Bodar can be considered wherein he has stated that one Dr. RK Patel has made request to him (i.e. to PSI Mr. Bodar) that he viz. Dr. Patel would like to shift Amrutbhai -convict

accused to other hospital and so the convict accused was sent with him under the police escort to Karnavati Hospital. It appears that during that time, PSI Mr. Mer had already reached Prerana Hospital. There is no major controversy as to the time when PSI Mr. Mer reached Prerana Hospital. The statement of Dr. RK Patel and his evidence along with the papers of Karnavati Hospital could have thrown some light in this regard, but the same have not come on record with best reasons known to the Investigating Officer. However, Entry No.106 of 18.15 hours is sufficient to rule out the possibility of putting ante-timed entry of 17.10 hours. Entry No.14 of Sarkhej Police Station of 18.00 hours is innocuous entry wherein it is mentioned that some police personnels including wireless operator had left Sarkhej Police Station to petrol pumps. Of course, entry No.14 of 18.00 hours of Sarkhej Police station has not been exhibited independently, but when a particular police station diary entry is placed under a shadow of doubt, then to ascertain the genuineness of its evidentiary value, the Courts can positively give a look to certain aspects including;

(i)whether it is first entry on the page or the last entry;

(ii)whether the handwritings are materially different or the instrument with which it is

written differs;

(iii)whether any time is mentioned and the time gap between one or two immediately preceding entries and one or two immediately succeeding entries to the questioned entry, is mentioned.

In the present case, there are no entries between 16.15 hours and 17.10 hours i.e. entry Nos. 12 & 13 and the entry No.14 of 18.00 hours is an innocuous entry and entry Exh.106 viz. entry No.15 of 18.15 hours regarding registration of the offence rules out the possibility of putting ante-time in entry No.13 of 17.10 hours i.e. exh.105 because the scope of putting ante-time would be very narrow otherwise the defence could have brought one aspect on record that the entry NO.14 of 18.00 hours is also ante-timed entry and the complaint might have been registered at a belated stage and after some deliberations. The time of visit of Ellisbridge Police Station by PW Bharatbhai and the time of arrival of the body of Arvindbhai to Prerana Hospital, if considered, the registration of the offence by Sarkhej Police Station at 18.15 hours reflected in entry No.15 exh.106, are sufficient for us to say that there are no elements of belated FIR and the time taken by the complainant side in a given facts situation in giving FIR or getting the FIR registered, the offence should not be viewed with any doubt and the document i.e. FIR given by PW Artiben,

according to us, does not suffer from any infirmity of delayed FIR. It is true that the observations made by the Apex Court in the case of **State of Haryana & Others v/s Chaudhari Bhajan Lal & Others, AIR 1992 SC 604,** reiterates the known principle that information disclosing a cognizable offence if is disclosed before the police officer, he has no option but to register the case on the basis of the opinion received. In the present case, Mr. Bodar, PSI of Ellisbridge Police Station has failed in doing so, but on facts, as discussed above, the same would not affect the credentials of the FIR of the present case given by PW Artiben. It is not necessary for us to reproduce the relevant paras 31 & 32 and other paras read over to us of the above-cited decision, because the Apex Court was dealing with the finding arrived at by Punjab & Haryana High Court in a matter arising out of a writ petition filed for the purpose of quashing of the investigation and the complaint.

In the case of **Sunil Kumar & Others v/s State of Madhya Pradesh, AIR 1997 SC 940,** the Apex Court has observed that the telephonic information to the police station about the disclosure of a cognizable offence even though not mentioning the names of assailants, can be treated as FIR. Here, we would like to reproduce relevant

para-20 of the said decision, which reads thus:-

> “20. While on this point we wish to mention however that the High Court erred in not treating the telephonic information that PW 3 gave to the police station as the FIR. It is not disputed that PW 3 did give an information to the police station wherein he stated that one person had been killed and another person had been dismembered and it was recorded accordingly in the diary book (Ext.P/17). The same entry discloses notwithstanding the absence of the names of the assailants therein a cognizable offence and indeed it is on the basis thereof that PW 6 initially started their investigation. Ext.P/17 will therefore be the FIR and the statement of Ramesh (Ext.P.2) which was recorded by him in the course of the investigation is to be treated as one recorded under Section 161, Cr.P.C.”

In this cited decision, the Investigating Officer, on registration of entry, has started investigation and the statement of one Ramesh- PW.2 was also recorded. Here in the present case, PSI Mr. Bodar as well as PC Mahendrakumar Prajapati had acted as if everything is to be done by Sarkhej Police and Sarkhej Police was asked to do the needful and visit the place of offence i.e. Shantivan Farm. The first message sent to Sarkhej Police

Station by itself was not an order of the Investigating Officer i.e. PSI Mr. Bodar and sending of the police team with the convict accused Amrutbhai to Karnavati Hospital can not be equated with initiation of the investigation. So, the Court should look to the information received by Sarkhej Police Station vide entry exh.104. We have discussed about the evidentiary value of the said entry and contents thereof.

The decision in the case of **Vajsi Deva Mehr v/s State of Gujarat, 1964 Vol.6 GLR 834,** Division Bench of this Court has observed that in the instant case, a telephonic message was the FIR as contemplated by section 154 of CrPC and other things which transpired subsequently must have been done in the course of investigation. In the cited decision, the Head Constable, in charge of the police station, had received telephonic message regarding the occurance of the offence and he made entry exh.7 in the police station diary at 10.20 p.m. At that time, PSI was on petrol duty and on seeing the crowd at about 1.25 p.m., he reached to the scene of offence and saw a man lying injured on the ground in an unconscious condition and he had inquired from Police Constable Ratidhar who was present at the scene of offence to fetch a taxi or any other vehicle for removing the injured person to the hospital. Meanwhile, PW Hamir Viram had reached there and made a statement

before PSI. PSI himself had already reached to the scene of offence and on his evidence it was found that it was his visit to the scene of offence on account of the information received by the police station. Here, PSI Mr. Bodar had not visited the scene of offence nor had even moved towards the scene of offence. The law developed by our Courts is clear on the point that information of cryptic nature received by the police station can not be treated as an FIR, even though the same is sufficient to draw an inference that some cognizable offence has been committed somewhere or at a particular place.

In the case of **Superintendent of Police, CBI & Others v/s Tapan Kumar Singh, 2003 AIR SCW 2133,** while dealing with the case under Prevention of Corruption Act, the Apex Court has observed in para-16 that a general diary entry may be treated as FIR in an appropriate case where it discloses the commission of a cognizable offence. It is also observed that FIR is not an encyclopedia which must disclose all facts and details relating to the offence reported. But in the cited decision, the Apex Court was dealing with the decision of the Calcutta High Court in a writ petition arising out of quashing of investigation as well as general diary entry of 17.10.1990 and the FIR lodged by Superintendent of Police, CBI. It was also prayed for return of money

and other articles seized from him by SP, CBI on 18.10.1990. On careful reading of the entire judgment, we are of the view that this judgment would not help the defence side and in our view, on the strength of the cited decision, entry of Sarkhej Police Station exh.104 i.e. Entry No.12 in the present case, can not be treated as FIR on facts. So, the FIR in the present case Exh.132, in our view, given by the complainant Artiben is the FIR within the meaning of section 154 of CrPC. For the sake of arguments, if we say that entry Exh.105 of 17.10 hours is considered as FIR, then it would not make much difference because in this entry, name of the convict accused is mentioned along with the basic details of the manner in which the offence has been committed by the accused persons. So, the arguments advanced by ld. APP Mr. Dave to treat the complaint of Artiben as an FIR, being legal and logical, is found acceptable and submission of ld. Sr.Counsel Mr. Thakkar advanced in this regard, are turned down.

37. The word “information” means something in the nature of a complaint or acquisition or at least information of a crime given with the object of putting the police in to motion in order to investigate and there must be evidence to show that this information was reduced in writing by the police officer and simultaneously it should not be of a cryptic nature, is the relevant law.

Now, in the entry exh.105 of 17.10 hours, at least the name of the convict accused is reflected wherein also the place of incident is mentioned and it is also stated that the injured was brought to Prerana Hospital located near Parimal Garden Railway Crossing of city of Ahmedabad, where he has been declared dead. The subsequent entry No.16 of 18.30 hours states that at that time, Police Constable Buckle No.769, 202 and 235 had left Sarkhej Police Station for Karnavati Hospital to keep a watch and restrain i.e. Japta. Of course, the facts are some what different, but the observations made by the Apex Court in the case of **Jai Shree Yadav v/s State of UP, 2004 AIR SCW 4673 (= AIR 2004 SC 4443),** provides sufficient guideline to us while evaluating the arguments advanced by the ld. Sr.Counsel Mr. Thakkar that the entry of 17.10 hours being ante-timed, the subsequent entries including registration of the complaint should be viewed with doubt. In the cited decision in the case of Jai Shree Yadav (supra), the Apex Court was dealing with a murder case and one point agitated by the appellant before the Apex Court was that the FIR was ante-timed. We would like to reproduce relevant para-17 of the cited decision which reads thus;

> 17. Learned counsel had next contended that it has come on record that the incident in question was reported to the higher authorities through radio

transmission and an application filed by the defence to produce the records pertaining to this transmission has been rejected by the trial court and according to the material available on record the said transmission had not given the names of all the accused concerned to the senior officers which also indicated the fact that the FIR in question has come into existence after the radio transmission was made. We are unable to accept this argument either. We think the trial court has given good reasons for not allowing the application for summoning the records pertaining to radio transmission of police communication, at any rate the accused having not challenged the said order, the same has become final. That apart it should be noted that the messages transmitted to higher authorities of an incident in question is only an information sent about a crime that has occurred which does not require all the particulars of the crime to be stated. In the instant case obviously because one of the deceased was a prominent person of the area concerned, the higher authorities were informed through radio transmission that his murder has taken place and in such communication, in our opinion, it is not necessary that the names of all the persons or other particulars as stated in complaint ought to have been mentioned or that non mentioning of such

particulars in such communication gives rise to an inference that at the time when the transmission was made the investigating agency was not in the know of the names of all the accused. Both the courts below have considered these aspects of the defence case as to ante-timing of the FIR and have rejected the same and we are in agreement with the findings of the courts below, hence, we reject this contention of the learned counsel for the appellants in regard to ante-timing of the FIR."

In the said decision, the Apex Court has rejected the contentions with regard to ante-timing of FIR.

38. The Court is able to appreciate the mental state of mind of PW Bharatbhai or his son who had accompanied PW Bharatbhai to Ellisbridge Police Station as well as of complainant Artiben. After considering the facts in the case of **Ravi Kumar v/s State of Punjab,** the Apex Court has held that it can not be said that there is delay in lodging FIR or in sending special report thereafter to a Magistrate under section 157 of CrPC. In this cited decision, the injured was taken by his brother to the hospital, condition of the deceased was serious, and as such thereafter he was shifted to another hospital, deceased died in the hospital and FIR was lodged in the police station which was few kilometers away from the

hospital. The Court held that there is no unreasonable delay in lodging FIR. In the present case, involvement of accused No.1 at least and that too as a person responsible for causing bullet injury to Arvindbhai was intimated to the police and mainly to PSI Mr. Bodar immediately on his arrival at Prerana Hospital. Father of a daughter even if had failed in insisting his say in Ellisbridge Police Station and that too naming the father-in-law of his daughter as an accused for causing fatal injuries to his son-in-law and son of the accused, at least, should not take this Court to a conclusion that this failure or some negligence shown by PW Bharatbhai was with some ulterior motive and with a view to suppress something which was within his knowledge. So, we do not accept this set of arguments advanced on behalf of the convict accused by ld. Sr.Counsel Mr. Thakkar.

39. Referring relevant provisions of the Evidence Act, the argument advanced on behalf of the convict accused by ld. Sr.Counsel Mr. Thakkar that no statement of confessional nature should be read or considered for recording conviction is a valid argument because there is no evidence of convincing nature either from PW Bharatbhai or from PW Rahul or even from complainant PW Artiben that prior to the arrival of Ellisbridge police, the accused had confessed about the wrong committed by him. The conversation that has taken place between PSI

Mr. Bodar and accused Amrutbhai can not go in the evidence because it would fall in the excluded area by section 26 of the Evidence Act. Of course, the accused was not in police custody till PSI Mr. Bodar decided to send the convict accused to Karnavati Hospital under a police escort and that too after the request made by a doctor to take him out of Prerana Hospital, but the moment when PW Artiben had named the convict accused as a person responsible, the steps that were taken by PSI Mr. Bodar from ICU qua the convict accused were in the capacity of a police officer. He may have decided that he would not take the responsibility of any part of the investigation under any logic or understanding as the actual place of commission of the crime was falling under the territorial jurisdiction of some other police station, but the question asked by PSI Mr. Bodar to convict accused was only with a view to confirm the facts conveyed by PW Artiben and it is legally possible to infer that on the strength of the reply given by the accused, he had arranged for police escort while permitting the convict to go to Karnavati Hospital. The crucial question before us would be that if the Court finds that confessional statement made by the convict accused before PSI Mr. Bodar would not fall in the category of exclusion provided under section 27 of the Evidence Act, then what would be the effect of the ultimate finding of the conviction recorded by the trial

Court. Section 25 of the Evidence Act says that no confession made to a police officer shall be proved against a person accused of any offence. So, any statement verbally or by conduct or gesture made by the accused to a police officer can not be received as a piece of evidence. In our view, the evidence of PSI Mr. Bodar is also not sufficient under which it can be accepted that it would fall in the category of the statement under section 27 of the Evidence Act. So, the decisions cited by Mr. Thakkar on this aspect viz; **(i) Emperor v/s Mallan Gowda Parwat Gowda, 1970 BLR 683 and (ii) Champa Rani Mondil v/s State of West Bengal, 2000(10) SCC 608,** are not required to be discussed. But according to us, this Court, in absence of any direct or indirect confession of the convict accused, can appreciate the strength in the case of prosecution and it clearly reveals that the conviction recorded by the ld. Trial Judge is not solely based on the so-called confession made by the convict accused.

40. It is true that the case of the prosecution mainly depends on the circumstantial evidence because the eye-witnesses to the incident have not supported the case of the prosecution. As per the settled legal position, the prosecution can not build a new case and if the case placed by the prosecution is based on the direct

evidence of the eye-witnesses, then the prosecution should establish the case accordingly. But the prosecution can simultaneously place the case before the Court on both the counts i.e. direct evidence coupled with the circumstantial evidence and can submit before the Court that there is sufficient evidence to link the accused with the crime irrespective of the direct evidence. The present case is of that nature and therefore only all attempts have been made to show to this Court that the findings recorded by the ld. Trial Judge are erroneous because there are no adequate circumstance or circumstances under which the convict accused can be linked with the crime. When the Court is dealing with the adequacy of the circumstance against the accused and the existence of the change of circumstances linking the accused with the criminal act, the Court shall have to consider the various judgments cited on behalf of the convict accused. On the strength of the cited decisions referred to herein below, a submission is made that for want of sufficient circumstantial evidence, the accused should be acquitted and the order of conviction and sentence be quashed.

(i) In the case of **State of Punjab v/s Bhajan Singh & Others, AIR 1975 SC 258,** the Apex Court has observed that the suspicion by itself however strong it may be, is not sufficient to take the place of proof and warrant the

finding of guilt of the accused. In the cited decision, the case of the prosecution was based on extra-judicial confession and other circumstantial evidence. The doctor was unable to find out the cause of death because the dead body was in decomposed state. Failure of the doctor in not sending the dead body to an Autopsy Expert was considered and the Apex Court observed that no adverse inference against the accused can be drawn. On facts, this judgment would not help the accused and it is rightly argued by ld. APP Mr. Dave that the present case is not the case based on a mere suspicion and there are circumstances which include the conduct of the accused. While enlarging this point, one example is given by Mr. Dave that if bullet in the body of the deceased was of the type that could have been fired from 0.22 Caliber pistol, then the police would not have failed in getting the weapon from the house of the accused at the first instance. Had it reached to the house of the accused so that the wife of the accused could produce the same and there was no reason for anybody to play with the fire pin or weapon being of different bore.

(ii) In the decision relied upon in the case of **Nesar Ahmed and another v/s State of Bihar, AIR 2001 SC 2416,** in para-10 & 11 of the said decision, the Apex Court has observed that there must be clinching circumstance as to negate the reasonable hypothesis inconsistent with

innocence of the accused. The link to complete the chain of circumstance doubtful in absence of proof of presence of accused at crucial time at place of occurrence. Of course, there is no direct evidence as to the presence of the convict accused at Shantivan Farm on account of the hostility of two important witnesses as discussed above, but there are other circumstances to show that the accused must be there at Shantivan Farm. In this cited decision, the husband of the in-laws of the deceased were facing the prosecution and it was found that they were leaving the house at 10.00 a.m. whereas the deceased died at 11.00 a.m. in the house according to the prosecution. So, the ratio considered by the Apex Court is well-established law on the point of circumstantial evidence, but the facts being materially different, would not help the accused.

(iii) In the case of **K. Angara v/s State of Kerala, (2001)10 SCC 539,** the Apex Court has held that on facts, there is no complete chain of circumstances so as to reach to the only conclusion as to the guilt of the accused -appellant. It is true that the chain of circumstances should be complete and this circumstance should be sufficient to reach to the only conclusion of guilt of the accused and totality of the circumstances should not leave any room to think about the possibility of innocence. In absence of such evidence, the Apex Court

has reversed the order of acquittal and sentence passed against the accused. The chain of circumstances relied upon by the prosecution is mentioned in para-4 of the judgment. There were in all 12 circumstances, but on failure, the Apex Court found that circumstance Nos.11 & 12 were not treated by the trial Court as link which could be used for formation of the case. So, on facts, this decision is different than the present case.

(iv) In the case of **State of UP v/s Arun Kumar Gupta, (2003)2 SCC 202,** The Apex Court has confirmed the acquittal mainly on the ground that there was discrepancy in evidence of Medical Officer and it was highly improbable that the deceased was murdered in the house of the accused which was situated in a crowded locality and when the family of the accused was residing and that the prosecution failed to send the blood stained material to the chemical examination and at the time of recovery, no person residing in the immediate proximity of the house of the accused was summoned. Further, the extra-ordinary interest was shown in the investigation by PW 2 and interested witnesses. Though the prosecution has successfully established the motive, has failed to prove the vital circumstances against the respondent accused. In that circumstance, the Apex Court confirmed the acquittal recorded by the High Court on these grounds. It is true that in the present case, the wife

of the deceased had actively participated in the trial all throughout. She had also participated actively in getting Special PP appointed and/or change of Spl.PP. She also belongs to the family which is capable of contesting legal battle. There are some admissions in her deposition as to the suggestions made by the defence counsel, but all these efforts are the efforts of a victim who lost her husband. So, to protect her interest, if she had participated in prosecution actively after arrest of the accused persons, would not make her evidence i.e. evidence of PW Artiben as an evidence of a infirm witness. There is no evidence to show that any blood marks were present at Shantivan farm. So, there was no question of sending the sample to get affirmative opinion as to the presence of the blood of the deceased on the spot of incident. In the present case, the place of incident is established by different types of evidence and as it is not possible for the Court to say that there is sufficient evidence to say that the incident may not have occurred at Shantivan Farm and deceased must have sustained injuries somewhere else. As discussed earlier, there is no discrepancy in the evidence of the prosecution witnesses who have supported the case of the prosecution and the negligence on the part of the Ellisbridge Police as well as Sarkhej police has not made the case of the prosecution infirm or weak.

(v) In the case of **Shankarlal Gyarasilal Dixit v/s State of Bihar, AIR 1981 SC 765,** the Apex Court has held hat in a case of circumstantial evidence, the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. It is not to be expected that in every case depending on circumstantial evidence, the whole of the law governing cases of circumstantial evidence should be set out in the judgment. The judgment must show that the finding of the guilt, if any, has been reached after appropriate and careful evaluation of the circumstances in order to determine whether they are compatible with any other reasonable hypothesis. Here, according to Mr. Thakkar, there is ample possibility of false implication because of the property dispute with the convict accused and PW Artiben had developed inimical feelings against the convict accused and there are ample possibilities that she might have played a great role in developing the case against the accused persons and mainly the convict. This decision is helpful to both the sides. Even the prosecution can make use of the ratio of this decision. The prosecution if establishes its case in order to succeed, then the stand taken by the accused becomes relevant and falsity in the plea taken by the accused or the conduct of the accused can be considered as an additional circumstances provided other circumstances point out unfailingly to the guilt of the accused, as

observed by the Apex Court.

41(i) Decision in the case of **Binder Minda v/s The State, 1992 Cr.LJ 3508** is cited by the ld. Sr.Counsel Mr. Thakkar in support of the argument that merely because there is sufficient evidence to establish the ownership and possession of the muddamal weapon of convict accused, mere making of a test fire cartridges and three caps of cartridges recovered by the police during investigation, can not be said to be sufficient or conclusive to prove the guilt and to fasten the accused with culpability. But, it is rightly submitted before this Court that that the case of the prosecution is based on various circumstances including the opinion of Ballistic Expert. One or two clinching evidence sometimes are capable of bringing home the charge beyond reasonable doubt and culpability of the accused can be established on such clinching circumstance. The case before the Corissa High Court in the cited decision, on facts was substantially different.

(ii) In the same way, in the case of **Balbir V/s State of Rajasthan, 1994 Cr.LJ 1299,** the Rajasthan High Court observed that there was no evidence that the accused had fired a pistol at the deceased. The use of a fire arm was found established, even then the Court decided to acquit the accused from the offence punishable

under section 302 of Indian Penal Code and the Rajasthan High court found that the testimony of the witnesses that they were knowing the accused does not inspire confidence. So, when the oral version of the witnesses was not sufficient to inspire confidence in the mind of the Court and the oral dying declaration of the deceased was not believed by the Court, the Court decided to acquit the accused from the offence of murder. This decision has a persuasive value. Even otherwise, on facts, this cited decision would not help the accused because the case before Rajasthan High Court was the case mainly based on oral dying declaration made by the deceased and that too before the persons who were knowing the accused.

(iii) In the case of Damnation **Guru Pathnames v/s State of Gujarat, 1998 Cr.LJ 2766,** the Court, on appreciation of evidence, had found that that the circumstances are totally inconsistent with the guilt of accused and the conviction on mere recovery of chit written by accused to another accused referring to murder, is not sustainable. The incident of earlier quarrel between the accused and the deceased was found of no significance. The accused were given benefit of doubt. Here in the present case, as such there was no quarrel prior to the incident of murder. There were some disputes as to the division of the property and actual

physical partition and the deceased had left for Shantivan farm as per the personal knowledge of the complainant and thereafter she came to know from another prosecution witness that her husband has sustained bullet injury in the quarrel at Shantivan farm and this message was received from Shantivan farm. She herself had seen two out of three accused persons bringing deceased to the hospital. The nature of evidence in the present case is quite different and hence the above-cited decision would not help the accused. We have considered relevant paras 17 to 19 of the cited decision and in these paragraphs, the case of the prosecution as proved, has been discussed. On the contrary, the observation made by this Court in para-19 of the said decision, say that the Court is supposed to consider all human probability in reference to the occurrence.

(iv) In the case of **Ramreddy Rajeshkhanna Reddy and Anr. V/s State of Andra Pradesh, 2006(2) GLH 271,** the Apex Court has reiterated the principle that in a case of circumstantial evidence, a suspicion can not be substituted for proof even in the cases involving “last seen together” theory. The accused persons including the convict accused, in the present case, were seen simultaneously at Prerana Hospital. Convict accused was seen at Prerana Hospital and simultaneously accused Nos. 2 & 3 were seen taking out the body of the deceased from

their red colour maruti car and it was seen by more than one witnesses viz. PW Artiben and her father PW Bharatbhai. If all the three accused persons were innocent, than what would be the conduct of all these three persons who were there in Prerana Hospital in couple of minutes? None of them have complained against any third person or un-known person though all the three persons were capable of doing so. On the contrary, it is clear from the evidence that in couple of minutes, all the three left the hospital and in the meanwhile, PSI Mr. Bodar had asked some questions to convict accused and he was sent to Karnavati Hospital at the request of Dr. RK Patel under a police surveillance. There is neither any evidence nor it was suggested that because of the conduct of the family members of complainant Artiben, the convict was provided police escort to go to Karnavati Hospital. On the contrary, it is clear that in couple of minutes, it was noted by PSI Mr. Bodar that the convict is the accused of the crime and he can not be permitted to go to Karnavati Hospital without police surveillance. In the cited decision, The Court also found that there are number of loopholes and there is absence of solidarity in witnesses and they were examined by the police after two days. It is true that as observed by the Apex Court in the case of ***Baldev Singh (supra)***, for failure, the officer concerned can be subjected to departmental proceedings. If loopholes pointed out by

the defence side even if are of grave and serious nature or there is laxity in the investigation, that by itself would not help the accused. The Court is supposed to consider the case in its entirety and keeping in mind the laxity in investigation and loopholes pointed out and if it is possible for the Court to reach to a conclusion that irrespective of the loopholes in investigation and negligence on the part of the investigating agency in material aspect, it is possible to record the guilt of the accused, still the accused can be held guilty. It is the privilege of this Court being the appellate Court to re-appreciate and re-write the judgment on the strength of the arguments advanced and assistance provided to the Court on the basis of the R & P received from the Lower Court considering the scheme of section 374 R/w section 386 of CrPC. At this stage, we would like to quote relevant part of paras-10 and 21 of the decision of the Third Judge rendered in the case of **State of Gujarat v/s Miyana Abram Mamad in Criminal Appeal No.1216/84 decided on 23.04.04 (Coram: JM Panchal, J).** It is true that the Court was dealing with acquittal appeal wherein the accused was acquitted from the charge of the offence punishable under section 302, 453 and 324 of IPC and section 135 of Bombay Police Act. The ld. Judges comprising the Court of Appeal when equally divided in the decision, the appeal was referred to the ld. Third Judge under section 392 of CrPC. These

observations, being relevant for the purpose of recording finding afresh by this Court being the Court of appeal, we would like to quote the same:-

> “10. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. It is well settled that although in an appeal from an order of acquittal the powers of the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an order of conviction, yet, as a rule of prudence, it should always given proper weight and consideration to such matters as (i) views of the trial Judge as to the creditability of witnesses; (ii) presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted by the trial Court; (iii) right of the accused to the benefit of any reasonable doubt, and (iv) slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge, who had advantage of seeing the witnesses. It is well settled that where two reasonable views can be drawn on the evidence on record, the High Court, as a matter of judicial caution, would refrain from interfering with the order of acquittal

recorded by the Court below. In other words, if the main grounds on which the Court below has based its order acquitting the accused, are reasonable and plausible, and can not be entirely and effectively dislodged or demolished, the High Court should not disturb the acquittal. However, there is no manner of doubt that the appellate Court has full power to review an order of acquittal and to come to is own conclusion in appeal against the acquittal and to come to its own conclusion in appeal against the acquittal. The only requirement that the appellate Court must observe is that while dealing with the order of acquittal, the appellate Court should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the trial Court in support of its order of acquittal, but it should also express its reasons which lead it to hold that the order of acquittal is not justified ...."

21. A fair reading of the judgment delivered by the learned trial Judge makes it clear that according to him the respondent might have or might not have committed offence because there was possibility of crime being committed by the husband of witness Sharifa. As observed earlier, relations of witness Sharifa were strained with her husband. Her evidence

would indicate that her husband had assaulted her mother with a stick. If crime in question had been committed by her husband, she would have been the last person to spare him. The evidence of witness Sharifa and that of other witnesses further establishes that relations with the respondents were not cordial and that the respondent had helped Sharifa in instituting maintenance case against her husband. In such circumstances, it is highly improbable that witness Sharifa and others, who were under obligation of the respondent, would falsely implicate him in such a serious case. Therefore, far-fetched doubt raised by the learned Judge is not justified at all. At this stage, it would be advantageous to refer to the pertinent observations from the decision in **State of Punjab v/s Karnail Singh, AIR 2003 SC 3609:**

> " Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice can not be made sterile on the plea that it is better to let hundred guilty escape than to punish an innocent. Letting guilty escape is not doing justice according to law. ***(See: Gurbachan Singh v. Satpal Singh and others (AIR 1990 SC 209)*** . Prosecution is not required to meet any and every hypothesis put forward by the accused. ***(See: State of UP v. Ashok Kumar Srivastava (AIR 1992 SC 840)).*** A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial,

> if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is guideline, not a fetish. ***(See: Inder Singh and another v. State Delhi Admn. (AIR 1978 SC 1091).*** Vague hunches cannot take place of judicial evaluation. "A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties." ***(Per Viscount Simon in Stirland v. Director of Public Prosecution (1944 SC (PC) 315)*** quoted in ***State of UP v. Anil Singh (AIR 1988 SC 1998).*** Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford an favourite other than truth." ***(See: Shivaji Sahabrao Bobade and another v/s State of Maharashtra, (1974(1) SCR 489.). State of U.P. v. Srishna Gopal and another (AIR 1988 SC 2154) and Gangadhar Behera and others v. State of Orissa, (2002(7) Supreme Court 276)."***

So, the Court is bound to consider the various shadows of doubt if pointed out in the background of the ratio propounded in the case of ***Karnail Singh (supra).***

42. We have referred the arguments advanced on behalf of the convict accused as well as ld. APP Mr. Dave for the State in reference to the infirmity as to the sealing procedure adopted by the investigating agency of muddamal articles and especially the doubts raised qua sealing of a parcel of muddamal bullet mark-"F". In the same way, we have simultaneously recorded our finding that we are not satisfied about the doubts shown to us on behalf of

the convict accused. However, it is necessary in the interest of justice to comment on two judgments over and above the decision of criminal appeal decided by this Court referred to herein above so that the parties may not feel that the decisions pointed out to the Bench have not been even referred to.

(i) The first decision relied upon by ld. Sr.Counsel Mr. Thakkar is in the case of **Navinkumar @ Shambhuprashad @ Bapji Chimanlal Vyas v/s State of Gujarat, 2006(1) GLH 409.** In this decision, this Court was dealing with the case under NDPS Act and while dealing with the arguments about improper sealing of muddamal samples, the Division Bench has dealt with other two decisions cited by the Accused viz. decisions in Criminal Appeal No.287/1999 & Criminal Appeal No.323/1996 along with other decisions. The ratio of the earlier decisions have been re-iterated in the above-cited decision and we have discussed earlier about these decisions while negativing the arguments advanced on behalf of the convict accused on the point.

(ii) The next decision relied upon by ld. Sr.Counsel Mr. Thakkar is in the case of **Amarjit Singh @ Babu v/s State of Punjab, 1995 Suup.(3) SCC 217.** On facts, the Apex Court in the cited decision, has observed that the police officer who had seized the weapon, had not seized

the same on the spot, but it was handed over to another person. So, non-sealing of Revolver on the spot was a serious infirmity as the possibility of tempering could not be ruled out. On examination, the Expert had opined that Revolver was in working order and, therefore, was insignificant since it could not be said with certainty as to what was the condition of the weapon at the time of recovery. Here in the present case, the panchas have not fully supported the recovery panchanama of muddamal Revolver from the house of the accused and there is no evidence of the wife of the convict accused on record as she has neither been cited nor has been examined as a witness. But it is clear that the place from where the muddamal Revolver was recovered is a genuine and being a licensed Revolver it is not possible for the Court to say that the prosecution has not proved beyond doubt that at the time of seizure and sealing of the muddamal weapon, it was not in working condition. On the contrary, the recovery of three used cartridges and an attempt to play with firing pin/striking pin are the circumstances under which it can legitimately be inferred that the opinion expressed by the Ballistic Expert Mr. Modi about the condition of the Revolver and its usability, should not be viewed with doubt. In the cited decision, on evaluating the evidence, the Apex Court was satisfied that the entire prosecution case was clouded with number of infirmities. The case on hand is the case of

undisputed ownership of the licensed Revolver.

(iii) The next decision relied upon is in the case of **Chandrakant Nagindas Modi v/s State of Gujarat, 1989 EFR 409.** The Division Bench of this Court was dealing with the case under NDPS Act where about 10 pallets of charas were recovered from the accused in plastic cover. It was placed in one Khakhi cover and seal bearing the signature of both the panchas were placed and thereafter the packet was tied with thread and sealed. When muddamal was received by Chemical Analyser, the seal was found intact. The slip bearing the signatures of the panchas revealed that the seal was not affixed on the packet containing the muddamal either by gum or sealing-wax. If it would have been properly affixed, it could not have been taken out intact. In that background, it was observed that the muddamal was not properly sealed and there was all the possibility of substituting the substance. Coupled with this, it was also found that the muddamal was lying with the police for about 2 months, which in the opinion of the Court was sufficient to raise doubt. We have already reproduced relevant observations of the Apex Court in the cited decision in earlier part of this judgment.

(iv) The next decision relied upon is in the case of **Mahmood v/s State of U.P., (1976)1 SCC 542.** In this

decision, the case was based on circumstantial evidence and the case of the prosecution was based on a solitary circumstance of discovery of finger prints on the weapon of murder. Weapon was not tested for human blood and the Court ultimately was able to suspect the possibility of finger prints having been fraudulently imposed on the weapon after arrest of the accused. The case was based solely on the opinion expressed by the finger print expert. The Apex Court found that in such a case, the corroboration is necessary and it would be unsafe to convict the accused without any independent corroboration. In the present case, success of the case of the prosecution does not depend on any sole or one or two stray circumstance and that too not connected inter-se. More than one circumstances have been placed by the prosecution and they are found linked with each other. So, this decision also would not help the accused.

43. It is argued that the order of conviction and sentence under challenge should be quashed because the prosecution has attempted to rely on two parallel sets of evidence, in view of the ratio of the decision in the case of **Harchand Singh and another v/s State of Haryana, AIR 1974 SC 344.** In this cited decision, two accused were arraigned in assault of the deceased. The prosecution, in support of its case, examined two sets of eye-witnesses. The evidence of one set consisted testimony of three eye-

witnesses who were not present at the time of occurrence. According to the fourth eye-witness and according to the prosecution case, he was with the deceased at the time of assault. This fourth eye-witness was also shown to be unreliable witness by the other evidence produced by the prosecution. The Apex Court held that it was a case wherein one set of evidence condemned the other set leaving the Court with no reliable and trustworthy evidence upon which the conviction of the accused can be based. In the present case, as such there is no conflict or it is not possible to infer that the prosecution has tried to rely upon two contradictory sets of evidence. The prosecution has not categorically pleaded at all that the deceased had succumbed to the injuries caused by 0.22 Caliber bullet. This is a case of conflict of evidence between two experts. The prosecution case is consistent and is based on one set of evidence and it is substantively pleaded and placed before the Court that because of the bullet injury caused by the convict accused at Shantivan Farm with his licensed Revolver seized by the investigating agency. Muddamal bullet mark-”F” is the bullet that was sealed with the seal of Department of Forensic Medicine, VS Hospital, Ahmedabad. The bullet taken out of the body was sealed by the panel of doctors and this sealed bullet was handed over to police so that it can be examined and analyzed and on analysis and examination by Ballistic Expert, it was

found that it is possible to fire the bullet mark-"F" from the licensed Revolver of the accused. Thus, the case placed by the prosecution needs appreciation in light of the background of the evidence as to motive and the conduct of the accused prior and subsequent to the incident. So, according to us, the decision cited on behalf of the accused would not help the accused and we are not in agreement that it was the case of prosecution even before the ld. Trial Judge that the accused had fired O.22 bullet at deceased. The marks found on the trunk of the tree are possible by 0.22 Caliber bullet, is the opinion. On first visit by FSL Expert, this fact was not noticed. When no bullet or part of 0.22 Caliber bullet has been recovered from the farm or from the very trunk of the tree, in our view, the opinion of the expert is not required to be treated as conclusive because the possibility of causing such or similar marks by 0.32 Caliber bullet could not be ruled out. On the strength of the description of the bullet given by the doctor in the post-mortem notes, it is not sufficient to argue that the prosecution had placed the case of contrary nature saying that the bullet from O.22 Caliber pistol or weapon was fired. In our opinion, the case of the prosecution in nutshell before the Court is that the deceased had died because of the bullet injury caused by the accused and on investigation, the police found that the bullet was fired from the licensed Revolver of the

accused.

44. Four decisions have been cited in the background of the evidence collected by the investigating agency in the nature of statement recorded under section 164 of CrPC. In the present case, the statements of more than one witness have been recorded under section 164 of CrPC by the ld. JMFC, Ahmedabad (Rural). These statements have not been proved by the ld. Magistrate. For the reasons best known to the Investigating Officer, the name of this ld. Magistrate was not shown even as a witness in his report submitted under section 173 of CrPC and the prosecution could not examine the ld. JMFC because the ld. JMFC who had recorded those statements under section 164 of CrPC, had left India permanently for USA and it was not possible for the Court to secure his presence. It appears that no sincere efforts were made by the prosecution to secure his presence and it was not impossible to get the proof of one fact that the statements of the witnesses and other two important witnesses namely PW Gulamnabi Mubarakkhan and PW Dashrath Thakor were recorded by ld. JMFC Mr. Chaudhari. Obviously therefore, the contradictions have not been proved qua the statements made by all these three witnesses in reference to their earlier statement recorded under section 164 of CrPC nor the statements have been exhibited for want of evidence of ld. JMFC Mr.

Chaudhari.

(i) In the case of **Brij Bhushan Singh v/s Emperor, AIR (33) Privy Council 28,** it has been observed that the statement recorded under section 164 of CrPC can not be used as a substantive piece of evidence and can be used to cross-examine the person examined i.e. maker of the statement, and the result may be to show that the evidence of the witness is false. But that does not establish that what he has stated out of the Court under section 164 of CrPC is true.

(ii) In the case of **State of Delhi v/s Shri Ram Lohia, AIR 1960 SC 490,** the Apex Court has propounded the very ratio and has observed that such a statement can be used only to corroborate or contradict the witness.

(iii) In the case of **Ram Kishan Singh v/s Harmit Kaur and another, 1972 Cr.LJ 267,** the Apex Court has considered the evidentiary value of the statement recorded by the Magistrate under section 164 of CrPC. Some part thereof has been established and the Apex Court has held that the High Court was wrong in setting aside the acquittal and the appellant accused was set at liberty.

(iv) In the case of **Balak Ram v/s State of U.P., (1975) 3 SCC 219, (group matters),** the Apex Court has observed that the evidence of the witnesses whose statements are recorded under section 164 of CrPC, must be approached with caution because such witnesses feel tied to their previous statements given on oath and have but a theoretical freedom to depart from the earlier version. A prosecution for perjury could be the price of that freedom of telling the truth even to the Court. Here, no such question has cropped up because of the departure of the ld. Magistrate from India to USA and for want of examination of the ld. Magistrate during trial who recorded the statements under section 164 of CrPC.

45. Once we had thought to examine Mr. Chaudhari, Ld. JMFC while in USA asking him to depose in trial because the Court is at liberty to examine the witnesses if need be in the Court or by appointing a Commission and in recent time because of the advancement in the technology, the deposition can be recorded by using device of tele-conferencing and even offering an opportunity to cross-examine to the defence counsel and Mr. Chaudhari can be directed to appear at a place from where he can be examined and his deposition can be recorded, with the help of the office of Indian High Commission at USA. However, all this exercise, considering the deposition

of all the three witnesses before the Court, could have given, in view of above settled legal position, an opportunity afresh to comment on the credibility of the witnesses and to take appropriate steps in accordance with law, but it would not have carried the case of the prosecution any further. So, we dropped to undertake that exercise keeping in mind three major aspects viz. (i) protraction of trial and hearing of the present appeal, (ii) inconvenience that may be caused to the parties and expenses incurred or that may be incurred, and (iii) the expenses that the State shall have to incur. So, it would not be proper for us to make any comment against Mr. Chaudhari because he was not even shown as a witness in the chargesheet nor the ld. PP had attempted to get summons issued against him by seeking permission of the Court. But we are surprised that how the Registry of this Court could permit such an officer who is an important witness in a serious case of capital punishment and how he can be permitted to leave the job. The inquiry made by us on administrative side has led to make this comment that before accepting the request to resign from the job in the midst of the service and that too after serving for years and asking the officer to tender his resignation to the Government directly, a thorough inquiry in all such cases should be made whether the officer intending to leave job and country is an important or potential witness in any serious or

sensitive case in the capacity of a Judge or Magistrate, because in the present case, Mr. Chaudhari had made it clear that he intends to leave the job as he wanted to go to USA permanently, he was permitted without such inquiry as a result of which he could not be examined. Even the ld. Magistrate himself ought to have transparently stated this fact to the ld. District Judge while forwarding a letter of resignation and/or the ld. Chief Judicial Magistrate and/or ld. District Judge could have informed the Registry about the impact of leaving job and country by Mr. Chaudhari. We can not even think of that the parties of the present case being very strong financially, could have played any role because it would be unhealthy conjecture. Therefore, it is sufficient for us to say that before accepting the resignation or directing the judge concerned to tender resignation directly to the government, a through inquiry should be made and a special declaration from such officer requesting to relieve him form job on resignation, stating that he is not a witness or potential witness in a sensitive or serious criminal case in the capacity of a Judge, should be obtained. We direct the Registry to place these observations before Hon'ble the Chief Justice on administrative side so that appropriate administrative action can be taken in this regard.

46. As it is not legal for us to read the contents of

the statements recorded under section 164 of CrPC as they have not been proved, we accept the say of ld. Sr.Counsel Mr. Thakkar that the evidence collected by the prosecution in the nature of statement under section 164 of CrPC, can not be made use of against the accused. However, according to us, the case of the prosecution is not solely based on the deposition of a witness whose statement has been recorded under section 164 of CrPC.

47. A serious dispute has been brought on the point of identification of muddamal as well as measurements of bullet mark-"F". In the case of **Tahsildar Singh v/s State, AIR 1958 All 255,** the Allahabad High Court in para-118 has made certain relevant observations. It has been observed that where a particular weapon is stated to be responsible for a certain injury, the Court should specifically call upon the medical witness to explain whether or not the weapon could cause the injury in question. In the present case, Dr. Bhise was not shown either the Revolver or mark-"F" bullet and when measurements shown by Dr. Bhise in the post-mortem notes were materially different, then the prosecution could have shown the bullet mark-"F" and the weapon to Dr. Bhise and the resultant effect of not undergoing this exercise is posed as serious infirmity, as argued by ld. Sr.Counsel Mr. Thakkar. For the sake of convenience, we would like to reproduce relevant para-118 of the

judgment, which reads thus:-

> “118. We reserve for the end of this Chapter a clinching piece of evidence which establishes that Tahsildar did not shoot Dudh Nath, inasmuch as we shall show in what follows that the letter was shot with a bullet fired from a .303 bore rifle and not a .500 bore rifle, the only weapon attributed to Tahsildar by the prosecution witnesses. What we call the clinching piece of evidence derives from the medical evidence with regard to Dudh Nath's injury.
>
> This evidence discloses that the wound of entry of the bullet was in front of the abdomen and was 1/4 “ x 1/4 “ in size, while the wound of exit was on the back and was 1/2 “ x 1/3 “ in size. In the trial Court no one paid any attention to the nature of bullet causing an injury of these dimensions, and everyone seems to have assumed that it was in fact from a .500 bore rifle bullet. We considered this assumption of doubtful validity, hence we heard learned counsel specifically on the point and also consulted Taylor's “Medical Jurisprudence” and Major Julian S. Hatcher's “Fire-Arms, Investigation, Identification and Evidence”. Referring to high-velocity bullets Major Hatcher observes at page 202 of his book:
>
> “ The skin wound of entrance always

> corresponds in size to the diameter of the bullet used. It is very common for the aperture of entrance to appear smaller than the diameter of the bullet but this is an illusion, since the wound invariably admits a projectile similar to the one which caused it. The small appearance is due to elasticity and shrinkage of the skin."

It is also a fact that the wound of exit is usually larger than the wound of entrance. But no authority has been cited before us which could suggest that, unlike a wound of entry, the wound of exit can be smaller than the size of the bullet which causes it. During the hearing of the appeal we invited the learned State counsel to produce an expert before us who might give such an opinion, but he was unable to produce one.

Bullets of both .500 and .303 bores were produced before us and by measurement we found that a .500 bore bullet has a diameter of exactly half-an-inch, while that of a .303 bore bullet is slightly less than one-third of an inch. These measurements, coupled with the expert opinion contained in the above-mentioned standard work , leave no room for doubt in our mind that Dudh

Nath's injury was caused by a .303 bullet and not by a .500 bullet, and we should like to point out that we are strongly of opinion that if the prosecution case that Tahsildar fired the rifle Exh.1, which is of .500 bore, were true, Dudh Nath's entry and exit wounds would have been larger than that found by the medical officer. In point of fact, the wounds which were actually found by the medical officer are typically those caused by a .303 bullet.

This finding would exculpate the appellant of Dudh Nath's murder. Incidentally, for the benefit of subordinate Courts we should like to point out that where a particular weapon is stated to be responsible for a certain injury, the Court should specifically call upon the medical witness to explain whether or not that weapon could cause the injury in question. In the instant case the omission to do this with regard to the injury of Dudh Nath and Karna has led to unnecessary difficulty."

From the above paragraph, it is clear that there was conflict of evidence about the size of entry as well as exit wound found on the body of the person deceased and the Court held that no authority or any authenticity was brought before the Court whether the

exit would be smaller than the entry wound. The Court, therefore, called upon the bullets of .500 and .303 bore and they were produced before the Court and the measurements were taken. On the other hand, we have already expressed our view and finding in the context of the evidence led by two experts, and absence of evidence by Ballistic expert Mr. Modi as he was not able to give definite evidence on the point about the size of the entry wound. In the cited decision of the Allahabad High court, the element of elasticity in the skin vis-a-vis the muscles attached to it obviously was not looked into as it was not there. Here in the present case, a piece of skin taken out by the doctor was sent in a sealed condition to FSL and it was examined by Mr. Modi. No controversy has been brought before us pointing that the seal found on the parcel containing muddamal bullet mark-"F" and the piece of skin were different or say were not the same. So, there was ample scope for Mr. Modi to opine as an expert and there is no evidence either of Dr. Bhise or Mr. Modi on record to show that the entry wound of the size found on the piece of skin could not have been caused by the bullet mark-"F". It is true that Dr. Bhise could have been asked a pointed question by showing bullet and/or weapon, but this muddamal articles were examined by Ballistic expert and no evidence which can be said to be negative to the case of the prosecution is coming on record. So, absence of express

opinion whether would go against the prosecution or his situation of non-availability of the positive evidence should be looked in light of and in the background of other evidence available on record, is the question and in this background only, we have discussed the evidence in earlier paras of our judgment and we record our finding that the absence of any positive opinion by Mr. Modi or by Dr. Bhise would not affect the case of the prosecution adversely and we do not treat the error committed by the ld. PP in not showing the muddamal mark-"F" bullet to Mr. Bhise as an important infirmity. The ratio of the decision, therefore in the case of **Dinesh and another v/s State of Haryana, AIR 2002 SC 2374** would not help the accused. In this cited decision, it was alleged that the eye-witness was assaulted with sharp-edged weapon by the accused. However, he did not sustain any visible injury. The Apex Court found inconsistency between the account of eye-witness and medical evidence. The weapon seized being sharp-edged weapon, was found not shown to the doctor for soliciting opinion as to whether the injury on the body of the deceased could be caused by that weapon or not. So, in the background of non-acceptance of the version of the eye-witness, the infirmity of not showing the weapon to the doctor, obviously had become very relevant for the Apex Court. As it appears from the plain reading of the judgment and mainly paras 17 & 18 thereof, we are of the

view that the ratio of the cited decision would not help the accused. In view of the observations made in para 1 & 18 of the cited decision, we are also of the view that the ratio of the decision of the Rajasthan High court in the case **Raju Ram and another v/s State of Rajasthan, 1994 CrLJ 2348,** wound not help the accused. The facts are materially different. We would like to reproduce relevant paras 22 & 24 of the said decision to show that the facts are materially different and Rajasthan High Court found that the recovery of two muddamal articles having chance finger prints appears to be concocted, fabricated and doubtful. Here in the present case, the only allegation is made that the police has substituted the weapon and muddamal article mark-"F" bullet by tempering the seal as it was not sealed in presence of panchas. Paras 22 & 24 read thus:-

> "22. In the instant case, the alleged recovery of steel "katori" and mirror appears to be fabricated and suspicious. The wrapper containing steel "Katori: (Article 8) and mirror (Article 9) was neither produced in the Court nor it was established that it bore the signatures of the motbirs. As mentioned earlier, the delay in depositing the said packet in the Malkhana of Police Station as late as on 15.5.83 has also not been explained at all by the prosecution. The knife alleged to have been

recovered at the instance of Raju Ram vide recovery memo dt; 11.5.83 Ex.P.5 was not shown to PW 2 Dr. Pradeep Parakh, who had conducted the post mortem examination on the dead bodies of Bastimal and Smt. Sua Devi nor any suggestion was put to him as to whether the injuries sustained by Bastimal and Smt. Sua Devi, whose both legs were chopped off could be caused by such a knife. As per FSL, report Exh.5.49, the knife was found to be stained with human blood but its blood group could not be detected due to disintegration. The blood groups of the blood soaked clothes of deceased persons also could not be determined by the Serologist. Therefore, the prosecution evidence on this count is vague, incomplete and insufficient to conclusively prove that the injuries sustained by the deceased persons were caused by the knife recovered at the instance of appellant Raju Ram.

24. In the case in hand, the recovery of steel “katori” (Article 8), mirror (Article 9) having chance prints appears to us clearly concocted, fabricated and doubtful. Secondly, there is not an iota of evidence that appellants were seen in village Patodi on 10.5.83. The I.O. Had found as many as seven foot prints outside the house of the deceased persons on its northern side. Those foot

prints were preserved but for the reasons best known to the prosecution, those foot prints were not sent to the Footprint Expert for examination and comparison. Even the specimen foot prints of the appellants were not taken. A perusal of the post mortem examination reports of Bastimal and Smt. Sua Ex.P 1 and Ex.P.2 respectively which have been proved by P.W.2 Dr. Pradeep Parakh reveals that the deceased persons were inflicted multiple injuries on their neck, abdomen and other parts of the body and that even both the legs of Smt. Sua Devi were chopped off. Appellants along with co accused Mohd. Bux and Alladdin were challenged but Mohd. Bux and Alladin were acquitted of the offences under sections 302, 460 and 404 IPC. Hence, in our considered opinion, the evidence against appellant Raju Ram is not of clinching and conclusive nature unerringly point out that it was Raju Ram alone and none else, who committed the ghastly & gruesome murders of Bastimal and Sm. Sua."

In the case of **Ramnathan v/s State of Tamil Nadu, AIR 1978 SC 1204,** it was argued that the photographs of the muddamal bullets were not taken by the fire-arm expert. The Apex Court found on evaluating the evidence that there has been considerable difference of opinion amongst the investigators regarding the use of

photographs in the Court for the purpose of illustrating the matching of markings. After evaluating the evidence of expert Ramiah (PW.23), the Apex Court has observed in para-26 of the decision thus:-

> "26. It is true that there has been considerable difference of opinion amongst investigators regarding the use of photographs in a court for the purpose of illustrating the matching of the markings and while it may be that microscope photographs, when taken with the due care and in the best of conditions, may enable the evidence to be placed on the record in a visible form, it can not be denied that a court would not be justified in rejecting the opinion of an expert who has examined the markings under the comparison microscope simply for the reason that he has not thought it necessary to take the photographs. It is, therefore, not possible for us to reject the evidence of Ramiah (P.W.23) who has categorically stated that he had compared the land and grooves markings on the bullets under a comparison microscope, simply because he did not think it necessary to take the photographs."

It is relevant to note that the Apex Court was dealing with the order of conviction recorded by the Madras High Court under section 307 and 460 of IPC and

also under section 27 of the Arms act. The High Court has confirmed the sentence of death for the offence punishable under section 302 of IPC and upheld the sentence of imprisonment for life for the offence punishable under section 307 of IPC and R/I for 10 years for the offence punishable under section 460 of IPC. The Apex Court was dealing with a case where the husband and son of the injured witnesses were killed on account of gun-shot injury and the statement to police given by the injured in the hospital containing the satisfactory description of the accused. The Apex Court held that the description given by the injured should not be rejected merely because the injured person did not state at that time that the assailant was wearing a turban. The explanation of the witness is that she could not make the mention of turban in the statement because of the anguish, could not be said to be unsatisfactory. Here in the present case, the name of the convict was given to PSI Mr. Bodar is the say of PW Artiben. Evidence of PW Bodar confirms and corroborates the say of PW Artiben. Even if the admission made by the accused before PSI Mr. Bodar is not considered, then what weightage should be given to the infirmities cropped up on account of some negligence on the part of PSI Mr. Bodar himself, otherwise Mr. Bodar could have recorded the complaint of PW Artiben or a declaration in the nature of complaint from the accused himself as there is no big time

difference and there was no scope to falsely implicate the accused in the crime, is the question. The Court can consider all the aspects and can ignore some discrepancies emerging on plain reading of the evidence available. The prosecution is supposed to establish the case substantially beyond reasonable doubt. So, the arguments advanced by ld. APP Mr. Dave get some force from the observations made by the Apex Court in the cited decision, even if the said decision is not considered to have a binding force on account of the principles of “ratio decidendi”.

48. The decision in the case of **State by Deputy Superintendent of Police, Railway, Hubli v/s Dashrath s/o Marthandappa Malge and others, 1991 CrLJ 2632,** is cited with a view to support the arguments advanced about the error committed by the ld. Presiding Judge in placing the incriminating evidence against the accused in the form of questions while examining him under section 313 of CrPC. Some important circumstances against accused were not put to him in the cited decision in a specific manner and the manner of examination was not found which can be said to be just and fair opportunity to the accused. The Karnataka High Court remanded the matter for examination of the accused afresh. In the present case, it is argued that this infirmity should be treated as fatal to the case of the prosecution. In the present case, we have

carefully gone through the questions asked by the Court to the convict accused. As per settled legal position, the Court is supposed to put the evidence led by the prosecution in reference to the charge framed against the accused and the statement as well as set of questions asked by the Court as a whole should be seen. In the same way, the Court can not split the answers i n various parts. When the evidence is in the nature of opinion evidence by expert, asking of a separate question qua each opinion is likely to result into cross-examination of the accused. So, when the Court finds that certain general questions are sufficient to give the opinion to explain the contingency, then such question can be framed and some error even if committed or there is omission in complying with the provisions of section 313 of CrPC in stricto senso, would not vitiate the trial. It is settled that the Court must take care to put all relevant material circumstance appearing in evidence to the accused so as to enable him to say in his defence what he wants to say in respect of the prosecution case and explain the circumstance appearing against him. But as observed by the Apex Court in the case of **Ram Shankar Singh v/s State of West Bengal, AIR 1962 SC 1239,** and in the case of **Ajitkumar Chowdhry v/s State of Bihar, AIR 1982 SC 2058,** the accused should point out specifically that the non-compliance of asking a particular question

in a particular way has resulted into injustice. So, unless it is established that non-compliance has seriously prejudiced the defence, the accused can not argue that the same has vitiated the trial. So, according to us, the decisions cited would not help the accused and we are satisfied with the set of questions asked to the accused to explain incriminating circumstances against them.

One more judgment of the Apex Court in the case of **Datar Singh v/s The State of Punjab, AIR 1974 SC 1193** is cited and it is argued that the accused should be given benefit of the ratio propounded in the cited decision. By referring to paras 4, 5, 7, 10, 11, 22 & 23 of the cited decision, it is submitted that in the case before the Apex Court, the prosecution was based on the testimony of two alleged eye-witnesses whose evidence was not only unreliable, but also unnatural too and it was unsafe to link the accused with the crime. But on close reading of the judgment, we are of the view that the ratio of the cited decision ultimately would help the prosecution. Of course the Apex Court decided to acquit the appellant accused Datar Singh, but it is simultaneously observed that mere absence of a strong enough motive for committing unnatural crime as patricide or the mode of its commission could be of no assistance to the accused. The prosecution can not get benefit from

mere suspicious circumstance that the accused did not surrender or was not traceable merely for one year. So, the Apex Court in the cited decision, had considered all aspects including the conduct of the accused and the question of motive. In the case on hand, there is sufficient evidence of element of motive. Even in some cases, the motive is not required to be specifically pleaded and proved substantively by leading some evidence on the point, if the conduct of the accused in the present case corroborates the case of the prosecution qua the motive and also as to his involvement as discussed earlier. It is possible that the presence of the accused in Prerana Hospital in couple of minutes may be a co-incidence and like the presence of the father of PW Artiben or like PW Artiben herself, but arrival of two accused with the body of the injured and that too from Shantivan farm in their car and thereafter the presence of the convict accused in the hospital should be considered in light of other subsequent conduct of leaving the dead body of his young son in the hospital and practically escaping from the spot by taking help of one doctor so that he can request PSI Mr. Bodar and taking obligation of PSI Mr. Bodar, he got shifted himself to Karnavati Hospital, though he was not at all critical. It is not in evidence that he was shifted in a stretcher or even in a wheel-chair nor it is in evidence which has come on record directly or indirectly that he

was shifted in ambulance called from Karnavati hospital. On the contrary, it is clear from evidence that he was taken to Karnavati Hospital because of the recommendations made by one Dr. Mr. Patel under a police escort and one of the prosecution witnesses viz. PW Mahendrakumar Prajapati who has been examined has not said nor he is asked even by defence counsel that the convict accused was critical and he was shifted in a particular manner.

49. Five decisions have been cited before us by ld. Sr.Counsel Mr. Thakkar while developing the argument that what can be said to be “ratio decidendi”. The facts of the case has to be borne in mind. It is well-established that a fact situation obtaining in one case can not be said to be a precedent for another case. So, while applying the judgment cited when it is to be applied, the facts are required to be kept in mind. A decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom. We would like to reproduce relevant part of the judgment of the Apex Court in the case of **Kalyan Chandra Sarkar v/s Rajesh Ranjan alias Pappu Yadav and another, (2005)2 SCC 42,** wherein in paras 41 & 42, the Apex Court has observed thus:-

“41. In our humble opinion, in the case of ***Jayendra***

Saraswathi this Court only distinguished the facts of that case from the facts of the present case in hand and the question of overruling a judgment on facts does not arise unless, of course, the Court is sitting in appeal over the judgment sought to be distinguished. This Court in ***Kalyan Chandra Sarkar*** decided the said case on the facts of that case only, so the question of the said case being overruled in another case does not arise. It is clear from the perusal of ***Jayendra Saraswathi*** case as well as ***Kalyan Chandra Sarkar*** that both the cases have been decided by this Court on their individual facts only.

42. While deciding the cases on facts, more so in criminal cases the Court should bear in mind that each case must rest on its own facts and the similarity of facts in one case cannot be used to bear in mind the conclusion of fact in another case. ***(See : Pandurang v. State of Hyderabad).*** It is also a well-established principle that while considering the ratio laid down in one case, the Court will have to bear in mind that every judgment must be read as applicable to the particular facts proved or assumed to be true since the generality of expressions which may be found therein are not

intended to be expositions of the whole of the law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what is actually decides and not what logically follows from it. ***See: (1) Quinn v. Leathem, (2) State of Orissa v. Sudhansu Sekhar Misra, (3) Amica Quarry Works v. State of Gujarat. "***

We express our agreement with ld. Sr.Counsel Mr. Thakkar that while dealing with the present case against the accused, the judgment relied upon by the prosecution should not mechanically be applied and merely some facts are similar, the decision of cited case can not be used as ratio because many other facts may not be identical to the facts of the cited decision. It is observed by the Apex Court in the case of **The Regional Manager and another v/s Pawan Kumar Dubey, (1976) 3 SCC 334,** that "it is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts." However, according to us, in the present case, it is neither

argued by ld. APP Mr. Dave nor we have evaluated the strength of the case of the prosecution on mechanical application of any decision of this Court or of the Apex Court. It is neither the finding of the ld. Trial Judge nor we are inclined to say that the case against the accused is covered by a particular decision cited before us of this Court as well as of the Apex Court. But, while evaluating the various facets of evidence, it is very likely that some piece of evidence may be weak in nature, but that would remain a piece of evidence and weak piece of evidence can not be made use of in recording the conviction, but that weak piece of evidence can add some strength of other evidence collected and adduced before the trial Court.

In the case of State of **Haryana v/s Ranbir @ Rana, (2006)5 SCC 167,** the Apex Court has held that a decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom. So, it is argued that while evaluating the evidence, the observations made in any decision should not be applied to even the case where the facts may be either similar or the Court is discussing the concept “broadly” like “circumstantial evidence”. After the discussion that is reflected in paras 12 to 16 of the cited decision, the Apex Court ultimately has held that “it is not necessary for Bench to follow the judgment of a co-ordinate bench in Pawan Kumar as was argued by the ld. Counsel.” In the

present case, it is neither the endeavour of the trial Court nor of this Court either to observe or to decide that because of a particular binding decision or the observations made by the Apex Court in any of the cited decisions before us, we decide a particular point either in favour or against the prosecution or defence. But, it is necessary to keep one basic principle in mind that while evaluating the entire set of evidence and dealing with the arguments whether a particular circumstance or evidence not on record can be said to be a weak piece of evidence or such a weak piece of evidence can be cautiously used even as a corroborative piece of evidence or not or that in a given set of facts whether the Court can satisfactorily held that the chain between the circumstance can be said to be existing and the same can be said to be clinching as placed by the prosecution, are the questions obviously can be dealt with in the background of the various decisions that have been brought to our notice or under which our criminal jurisprudence has laid down, has developed a basic thread. Such a basic thread obviously can be used to string the beads brought on record as a piece of evidence.

50. The case on hand became a case mainly based on circumstantial evidence on account of the hostility of two important witnesses examined by the prosecution whose

statements under section 164 of CrPC were also available with the prosecution which were recorded by the ld. JMFC, Ahmedabad (Rural). So, the decision shall have to be arrived at in the present case if the case is based on circumstantial evidence. So, it would be ideal for the Court to consider the cases where the prosecution is solely dependent on the circumstantial evidence. In the case of circumstantial evidence, it is well settled that:-

(i) In case of **K.Purshothaman v/s State of Kerala, (2005)12 SCC 631,** the Apex Court was dealing with the case where the appellant accused was dealing with a case where the appellant accused was found involved in the offence punishable under sections 120-A, 120-B, 403 and 477-A of IPC. On close reading of the ratio propounded by the Apex Court in the above decision and particularly in paras 10 to 15, 18 & 19, this Court is of the opinion that the same, probably, would help accused No.4 Ghanshyam Prakashdasji Swami because the case of the prosecution against the appellant accused was that he had accompanied original accused No.3 who was actually entrusted the gold of “DEVASWOM BOARD”. The gist of the finding of the decision is given by the Apex Court in paras 18 & 19 of the said decision. It would be relevant to reproduce the same:-

"18. From the findings arrived at by the High Court that it was A-3 who was entrusted with the gold by the Devaswom Board, and who was looking after the affairs of making the ornament golaka, simply because the accused- appellant had accompanied him to Coimbatore, it can not be inferred that there was an agreement entered into between them to misappropriate the gold. To constitute a conspiracy, agreement between two or more persons for doing an illegal act, or an act by illegal means, is a sine qua non. Although the agreement among the conspirators can be inferred by necessary implication, the inference can only be drawn on the parameters in the manner of proved facts, in the nature of circumstantial evidence. Whatever be the incriminating circumstance, it must be clearly established by reliable evidence and they must form the full chain whereby a conclusion about the guilt of the accused can be safely drawn. Even if we hold that at some point of time, the appellant-accused had some knowledge or suspicion about A-3 indulging in fraudulent misappropriation of gold, entrusted to A-3, in the absence of some positive evidence

indicating agreement to that effect, conspiracy could not be inferred. On the findings itself arrived at by the High Court, we cannot hold that the appellant-accused was the conspirator to misappropriate the gold, with A-3."

19. On the scrutiny of the entire facts led by the prosecution, the charge of conspiracy cannot stand as there is no link to show that the conspirators agreed to misappropriate the gold while the gold ornament was being prepared."

(ii) In case of **State of Haryana v/s Jagbir Singh and Another, (2003)11 SCC 261,** the Apex Court was dealing with the case squarely based on the circumstantial evidence. The inference of guilt can be justified only when all incriminating facts and circumstances are bound to be incompeteable with the innocence of the accused or guilt of any other person, is the ratio of the above cited decision. Considering the observations and discussion made by the Apex Court in paras 8 to 10 of the said decision, the obligation on the Court is that before holding the accused guilty in a case based on circumstantial evidence, the Court should take each circumstance and should be tested by the touch-stone of law relating to the

circumstantial evidence laid down by the Apex Court in the case of **Hanumant Govind Nargundkar and another v/s State of Madhya Pradesh, AIR 1952 SC 343 (1953 Cr.LJ 129).** In the present case, the finding of the guilt is recorded by the ld. Trial Judge considering the cumulative effect of the circumstances proved. So, while analyzing the factual aspect of the present case, it is possible to state that for a crime to be proved, it is not necessary that the crime must be seen or must have been committed and in all circumstances, be proved by direct ocular evidence or each circumstance should be as bright as the direct ocular evidence. It is now settled legal position that the Court is supposed to evaluate the circumstances available and proved legally during the course of trial because the offence can be proved by bringing various circumstances on record. It may be only one or more in number, but if they are more in number, a visible chain between these circumstances should exist. The existence of link between the circumstances should look apparent/visible. The principal fact can be held to be established qua the point in issue and that too by consistency in evidence. If the same is put slight differently, the

circumstantial evidence is not the direct to the point in issue, but consistency in evidence qua various other facts which are so closely associated with the fact in issue, which if taken together, form a chain or circumstance from which the existence of a principal fact **can legally be inferred or presumed. (emphasis supplied for the purpose of present judgment).**We can equate a circumstance with a sparkling star analogically. There may be collection of different stars in the sky. A star may give light to the other to the extent that one can say or claim that two stars together are sparkling (twinkling). It is like a constellation. So, the stars in the background of the dark sky may technically not be said to be linked or attached with each other, even then their group may constitute constellation and on concentration or by experience or having a vision, one can easily point out that a particular group of stars is forming a constellation and forming a particular shape and all these stars firstly and apparently are starring /twinkling in the sky separately and differently, but even then they do form a picture (constellation) popularly known as “Nakshatra”. Merely because some persons like the

present accused submit that there is no link in between the circumstances brought on record by the prosecution, but the prosecution simultaneously can equally submit that the Court should try to visualize the link between the circumstance and on attempts, the ld. Trial Judge found that the link between the circumstances exists. On detailed discussion that has been made by this Court in foregoing paragraphs of this judgment qua the facts and points placed before this Court by ld. Counsel Mr. Thakkar as well as by ld. Counsel Mr. Ravani for the CBI and ld. APP Mr. KT Dave, we are inclined to say that the link between the sparkling facts brought on record by the prosecution does form a constellation and the arguments advanced by Mr. Thakkar are not accepted that the prosecution has failed to prove the link between the circumstances that have come on record during the course of trial because some of the circumstances have either not been proved or have been held proved on the strength of inadmissible evidence. We have ignored the weak part of the circumstances or say the circumstances that have been held proved on inadmissible evidence or inadequate evidence, but the constellation of these circumstances do not dispute the strong link between

the circumstances which are capable to realize the existence of constellation or the facts proved. Here, it would be relevant to refer to the observations made by the Apex Court while dealing with the case placed on circumstantial evidence in the case of **Gura Singh v/s State of Rajasthan, 2001 Cri.LJ 487,** Which have been reproduced by this Court in the earlier para of this judgment.

(iii) In the background of the ratio of the decision in the case of **State of Rajasthan v/s Gopal, (1998)8 SCC 449,** and also in the case of **Bakshish Singh v/s State of Punjab, 1971(3) SCC 182,** even if accepted as good law till date, the same would not go against the prosecution, because in a case based on circumstantial evidence, the circumstances which are the conclusions of the guilt to be drawn, should be fully proved , is the first main condition and such circumstances must be conclusive in nature by itself, is the second condition. Moreover, all the circumstances should be complete meaning thereby each circumstance must be complete and such complete circumstance brought on record should be consistent and should constitute a chain, is the third important aspect and the fourth important aspect is that there

should be no gap left in the chain of circumstances. It is obligatory on the part of the prosecution that these circumstances must be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence. As observed by the Apex Court, if the motive is proved satisfactorily in a case based on a circumstantial evidence, then such a proof of motive would supply a chain of link. **(State of Gujarat v/s Anirudhsingh 1997 Cri.LJ 3397).** Circumstances in the nature of various crystals brought on record, may be having different size, shape and brightness, can get intrinsic thread to form a chain of constellation. So, the substantial success in bringing on record the motive for doing a criminal wrong by leading evidence, oral as well as documentary, makes the prosecution case powerful in saying that the circumstances collected and proved individually and/or collectively, should be viewed with intrinsic thread of motive pleaded and proved because as observed earlier, the motive for doing a criminal wrong generally is a difficult area for the prosecution to prove and one can not normally see in the mind of the others. As observed by the Apex Court in the case of **Nathuni Yadav v/s State of Bihar,**

(1978)9 SCC 238, the motive is an emotion which impulses a man to do a particular act. Such impelling cause needlessly and necessarily be proportionately grave to do a crime. Many murders have been committed without any known or prominent motive and, therefore, there is a scope that impelling factor leading to the accused to a grave offence would remain indiscoverable. This Court has appreciated number of circumstances as discussed in foregoing paras of this judgment and also has tested the strength and clarity of each crystal or circumstance emerging from record ignoring the comments made that are out of the ambit of the settled law, by the ld. Trial Judge. Large number of authorities have been placed before this Court wherein the Apex Court has decided the cases based on different facts situation wherein the prosecution cases are resting on circumstantial evidence, but it is not necessary to comment on each decision wen the observations made in the cited decisions have been kept in mind while evaluating the evidence as well as rival submissions.

51. When complainant Artiben had disclosed the name of the convict as the person responsible for the bullet injury caused to her husband and stated that her father-

in-law Amrutbhai had caused this injury and she had also pointed out that he is present in the hospital, so the each step of PSI Mr. Bodar towards Amrutbhai to get the confirmation about the facts stated by PW Artiben were the steps of a police officer. It is likely that he may not have got confirmation from the accused on that fact. In the present case, it is the say of the prosecution that the accused had accepted the allegation made meaning thereby that he had admitted the act, but undisputedly, it was an answer of a person who was pointed out as an accused to a police officer and the question asked by PSI Mr. Bodar to the convict accused Amrutbhai Patel in the capacity of a suspect of a crime mainly on account of a disclosure of his name by the wife of the deceased i.e. PW Artiben. So, as such, the admission of the fact as observed earlier by us, can not be read as a piece of evidence and that too being inadmissible in reference to the scheme of section 25 & 26 of the Evidence Act, but the statement of PSI Mr. Bodar Exh.101 positively can be used as a corroborative piece of evidence to the version of PSI Mr. Bodar to substantiate one fact that the complainant PW Artiben did disclose the name of the convict accused before him. The entry Exh.104 has been used by the defence side to throw a shadow of doubt as to the immediate disclosure of the name of the victim accused by the complainant and so also the evidence of PC Mahendrakumar Prajapati conflicting

the evidence of PSI Mr. Bodar. However, the same would make the conduct of these two police officers strange and suspicious only and in our view, would not cut the chain of circumstances or would affect adversely to the strength of the prosecution because the subsequent conduct of PSI Mr. Bodar to put the convict accused under surveillance and permit him to only on a request and recommendations made by some other doctor i.e. Dr. RK Patel to go to some other hospital under a police Japta (escort), would positively help the prosecution. On close reading of cross-examination of Dr. Bhise and the arguments advanced even before us on the point as to the time of death relying on the note made in the relevant column of post-mortem notes qua the state of food that was found in the stomach of the deceased at the time of post-mortem, the say of the accused in nutshell is that the deceased must not have even died before 5.00 p.m. and, therefore, the relevant Entry No.104 does not bear the name of the convict accused. The wife of the victim viz complainant PW Artiben may not have disclosed the name at that relevant point of time, but there is sufficient evidence of convincing nature available on record to show that on entry in Prerana Hospital itself, the injured Arvindbhai was declared dead. As argued before us, if the deceased had lived till 5.00 p.m., then the conduct of the accused should be considered as more strange and improbable conduct because an innocent

father would not leave his sinking son even through he had not become critical. The evidence reveals that convict accused went to Karnavati Hospital and he was sent to Karnavati Hospital under a police escort. It is neither the case nor the evidence that he was immediately shifted to Karnavati Hospital because he had become critical. It is not necessary for us to comment on the methodology being adopted in certain cases by the police because in certain cases, the Courts are not able to reach to a conclusion that what would be running in the mind of a person or struck in the mind of a police officer who was either present at the scene of incident or had reached to the scene of incident in couple of minutes or was sitting in the police station when he was approached by the informant for disclosure of a grave offence. In a case of grave, heinous offence or where a person having some repute and background in the society are being found involved in such offences, such infirmities are being found and have been recorded by the courts of our country in “n” number of decisions and such infirmities have been dealt with in the background of other evidence adduced by the prosecution in the trial. But it is now settled that an infirmity should be appreciated in light of the totality and other circumstances and there is no need to magnify or to attribute more weight than required to such an infirmity if it is found that the person with investigating agency

may be responsible for it. When an infirmity is placed as a weapon by the defence side to cut the case of the prosecution and/or to give rise to the theory of the probability contrary to the case placed by the prosecution, then the same, out of queue requires to be tested by the Court appreciating the evidence in view of the observations made by the Apex Court in the case of **State of Punjab v/s Karnail Singh, AIR 2003 SC 3609.** The Apex Court, in the cited decision, while dealing with the prosecution instituted on commission of the offence punishable under section 300 etc. of IPC, has observed that lacuna left or infirmity by not putting a question under section 313 of CrPC or account of some procedural errors should not be given undue importance when other weighty evidence is available on record. We would also like to quote relevant part of the observations made by the Apex Court in the case of **Visverswaran v/s State Rep.by S.D.M.,AIR 2003 SC 2471,** which reads as under:-

> "11. It is unfortunate that despite the aforesaid facts, the test identification parade was not held. An important aspect of the case is that the appellant had beard and mustaches when P.W.1 and P.W.2 were examined as witnesses for the prosecution. It was not so at the time of the occurrence. P.W.1 and P.W.2, therefore, it is

evident, could not identify him in Court and stated in their deposition that the said person is not in Court. It does not mean that the acquittal is to follow as a natural corroboratory from the statements of P.W.1 and P.W.2. The identification of the accused either in test identification parade or in Court is not a sine qua non in every case it from the circumstances the guilt is otherwise established. Many a times, crimes are committed under cover of darkness when none is to able to identify the accused. The commission of crime can be proved also by circumstantial evidence. In the present case, there are clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt.

12. Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to be borne in mind that approach required to be adopted by Courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity. Courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the Courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence

is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. **It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by Courts while evaluating evidence. It would not be just to acquit the accused solely a a result of defective investigation.** Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved." (Emphasis supplied).

Of course, in this decision, the Apex Court was convinced on the direct evidence of the girl who was raped by the accused, but the principle would equally apply in all the cases where any indirect evidence is available capable of weighing with the Court about the establishment of a particular fact and such various numbers of established facts are capable of creating a circumstance or a chain of circumstance which is sufficient to link the accused with the crime beyond reasonable doubt, then the infirmity left during the investigation or trial either by the investigating agency or by the ld. PP, would not come in the way, because the

endeavour of the Court should always be for search of a truth. According to us, the hostility of PW 18 Prajapati Babubhai Naranbhai would not come in the way merely because he has stated that on the date of incident, nobody had come to his place -Bhaththa for making a telephone call. The contradictions proved by the prosecution are sufficient to establish that his place of job is near Shantivan Farm and he has stated that his place of job i.e. Bhaththa is having telephone connection. For the sake of arguments it is accepted that nobody had been to this witness requesting him to permit him to make a telephone call and asking him to connect telephone number given by the said visitor, then what was the reason for PW Artiben to rush to Prerana Hospital and why she should make an attempt to inform the close relative so that they can also reach to Prerana Hospital. The distance between Shantivan Farm and residence of PW Artiben if considered and time required to reach to Prerana Hospital from Shantivan Farm and also from the house of PW Artiben to Prerana Hospital is considered, creates a fact situation that unless somebody sends “SOS” type message, she could not have reached Prerana Hospital simultaneously with arrival of the body of her injured /dead husband. So, when PW Artiben has said before the Court that she had received a telephone message from Shantivan Farm, then the proof of having telephone connection in near vicinity and at a very close

distance from Shantivan Farm can be taken into consideration to establish one fact that PW Artiben is not telling lie or is carving out a story that she had received a telephone message, otherwise it would have come on record that there is no telephone connection in near vicinity of Shantivan farm or connection, if any, of such subscriber was out of order. So, the evidence of PW 18 Mr. Prajapati can be made use of by the prosecution to seek corroboration to the say of PW Artiben that she had received a telephone call from Shantivan Farm. It appears that there is no investigation whether the accused convict is having a telephone connection at his farm house because it is in evidence that the portion of Shantivan Farm that had fallen to the share of the convict accused, has one bungalow constructed thereon. The Investigating Officer ought to have made attempts to take print out of the telephone connection, if any, or could have collected negative evidence from the department that farm house of the convict accused does not have any telephone connection. It appears from the evidence that before the car in which deceased Arvindbhai was being taken to Prerana Hospital could leave Shantivan Farm, Prerana Hospital must have been informed to be alert intimating it that some patient in serious condition is being brought to the hospital because the Prerana Hospital as emerging from the evidence is at 3rd/4th floor of Doctor House and the stretcher was

already brought near the car when the body of Arvindbhai was being taken out. There is no investigation as to who informed Prerana Hospital authority, what happened to the papers prepared by Prerana Hospital, why the doctors of Prerana Hospital had not cared to inform the police, whether the statement of the doctor on duty at Prerana Hospital has been recorded, whether Prerana Hospital has treated the injured accused when he was in the hospital, are the areas required to be investigated. However, it appears that nothing has been done by PSI Mr. Bodar before permitting the accused to leave Prerana Hospital under the police escort or it was not impossible for PSI Mr. Bodar to detain the convict accused till PSI Mer reached the hospital as convict accused was not really critical. But all these things could have added more to the strength of the prosecution case because there is sufficient evidence to show that the convict accused was very well there at Prerana Hospital and this evidence has come on record from more than three witnesses including PSI Mr. Bodar, who can be said to be an independent person than the family members of the complainant PW Artiben. The workers who were called to Shantivan Farm so that they can be deployed for work of erecting a wall, have not supported the case of prosecution. It is very likely that because of number of injuries found on the body of the person deceased, this witness might have denied their presence at the spot

under an apprehension that they may be implicated or shown as accused in a crime under section 319 of CrPC by the Court because the nature of other injuries found on the body are possible to be caused by a hard and blunt substance. In the same way, the hostility of panch or non-availability of evidence of one Kantibhai who had undertaken the work of erection of dividing wall, also would not go against the prosecution because there is sufficient evidence of police witnesses. There is evidence in the nature of panchanama of the scene of occurrence of incident and even of hostile witnesses including PW Gulamnabi Mubarakkhan have that the work of digging of foundation had taken place and length of the foundation ditch was found in existence, the Court should not presume that the contractor must have undertaken the work to erect a dividing wall by using a particular material and that too in a particular quantity and he was not asked to make a plaster on both the sides of wall or on any one side of the wall erected. It is not impossible to erect the compound wall by using minimum cement and readily manufactured cement bricks. Certain material simply can be laid down in a foundation because such walls have not to carry or bear heavy burden. Such walls simply divide the property and sometimes, they remain even symbolic to avoid dispute in future as to immovable property, is the experience of the society. So, non-availability of any material which

could have been useful for erecting a wall, would not make the case of the prosecution doubtful as to the place of incident. The place of incident, broadly a Shantivan Farm and a spot where a boundary between the land fallen to the share of deceased Arvindbhai and convict accused was notionally fixed and where there was a wire fencing existing. This is not a case where some confusion as to the place of incident would make the prosecution case doubtful. In number of cases, the Apex Court and this Court while evaluating the evidence of eye-witnesses, has considered this aspect while deciding the veracity of a witness and the cases where the Court finds that the incident must have occurred at some other place than the place stated by the eye-witness and in that event, his presence on the spot or his claim to be an eye-witness to the incident has been viewed with doubt. But the observations made in such or similar cases, obviously would not help the accused on some part that has been argued by Mr. Thakkar before us in the background of the principles of “ratio decidendi” judgments.

52. At one stage of the arguments, as discussed earlier, a serious attempt was made by the ld. Counsel to falsify the claim of Artiben that she had intimated PSI Mr. Bodar that her husband has been killed by the bullet injury caused by her father-in-law and that deceased might be living till 5.00 p.m. and, therefore, she had no reason

to disclose the name of her father-in-law as an author of the fatal blow. With this attempt made on behalf of the convict, whether this Court can pose a question that this mode of submission should be considered directly or indirectly against the accused because then it can be legitimately argued by the prosecution that all the three accused were in the company of the deceased who was brought to the hospital. So, they are the best persons to show the cause as to how and when the deceased sustained bullet injuries because there is satisfactory evidence to show that the injured was brought by accused Nos. 2 & 3 in the hospital and complainant Artiben was in the very lift wherein the deceased Arvindbhai was taken to the premises of Prerana Hospital in Doctor House. It emerges from the evidence that Doctor House is a big building and in one of the portion of this big building, Prerana Hospital is located and the deceased was taken at fourth floor where ICU is located. But without assuming against the accused persons because the hypothesis placed by the ld. Counsel appearing for the accused can not be used and taken into account in any way by the prosecution, since the accused are at liberty to place alternative or in some cases conflicting defence and can place all probable propositions to show a thick shadow of doubt. In nut shell, our say is that in our view, the following are the circumstances which are placed before us as infirmities or lacunas and according to us, some of them

can not be said to be infirmities or lacunas at all. We have discussed about other infirmities and lacunas in earlier paras of our judgment and it is possible to infer or assess as to who can be impeached or should be held responsible for such infirmities or lacunas even while reading the infirmities. The infirmities placed before us are :-

(i) Non-making of entry in the police register about the visit of PW Bharatbhai Patel and his son Chirag when they rushed to Ellisbridge Police Station with a request to accompany them to Prerana Hospital because of the bullet injury sustained by Arvindbhai;

(ii) Non-making of entry by PSI Mr. Bodar or PSO of Ellisbridge Police Station before leaving for Prerana Hospital along with police personnels, with their buckle numbers.

(iii) By not entering the details gathered by PSI Mr. Bodar after reaching Prerana Hospital otherwise either by telephone or by wireless, he could have intimated his police station i.e. Ellisbridge Police Station about the commission of a serious offence punishable under section 302 of IPC with names of the accused because it

is his say even in the statement before ld. JMFC under section 164 of CrPC that complainant PW Artiben had disclosed the name of the accused when asked by him at Prerana Hospital.

(iv) By not stopping or seizing the car wherein the deceased was brought to Prerana Hospital By PSI Mr. Bodar. AT least, it was possible for PSI Mr. Bodar to place that car under surveillance of police personnel especially when he had gone to Ellisbridge Police Station for a short period and then he had returned back to Prerana Hospital with Police Constable Mr. Mahendrakumar Prajapati.

(v) Non-seizure of the car at the earliest and within couple of hours by PSI Mr. Mer and not sending the same for FSL examination. Panchanama exh.125 is the discovery panchanama of 26.02.2002 i.e. after the lapse of so many days after the incident. The car has been recovered which was found at a reasonable good distance from the another area where it was parked in a small blank street described as “Khancha”.

(vi) By not giving instructions to Prerana Hospital to preserve the papers being very relevant in a medico-legal case either by PSI Bodar or PSI

Mer who had reached to Prerana Hospital where he had recorded the complaint of PW Artiben.

(vii) By not recording the complaint of Artiben when she had disclosed the name of the accused assailant and forwarding it for registration to Ellisbridge Police Station as “0” Number FIR because it was not impossible then to transfer the investigation to the concerned police station.

(viii) By not collecting the details from Dr. RK Patel who had requested PSI Mr. Bodar to permit him to take the convict accused Amrutbhai to Karnavati Hospital being a patient of diabetes and his status in Prerana Hospital and if he was from Karnavati Hospital, then not recording his statement that he is the person responsible for taking the accused with him and accused shall have to be treated subject to keeping of a police surveillance on him.

(ix) At the time of first visit by PSI Mr. Mer at Shantivan Farm on account of the message received from Ellisbridge Police Station, he could have placed the police surveillance on

the spot.

(x) By not collecting the evidence as to presence of car that was brought by the deceased to Shantivan Farm because it is in evidence that the deceased had left for Shantivan Farm in his contessa car and about the condition of the car.

(xi) Number of vehicle wherein the deceased and accused Nos. 2 & 3 traveled up to Prerana Hospital from PW Artiben, and if the convict accused had come to Prerana Hospital in a separate vehicle, then number of that vehicle with the name of the driver of that vehicle could have been collected by PSI Mr. Mer during investigation, which has not been done.

(xii) By not sending all the three injured after arrest for thorough medical examination and to collect the weapon in the background of number of injuries and type of injuries that were seen on the body of the person deceased.

(xiii) By not collecting the papers from Karnavati Hospital about the treatment given to convict accused after his admission in Karnavati Hospital and role of Dr.RK Patel there in that hospital who had taken the

convict accused to Karnavati Hospital from Prerana Hospital. The document exh.119 is one letter signed by the Medical Superintendent on 20.02.2002, which shows that the accused Amrutbhai was admitted as a patient in Karnavati Hospital on 17.39 hours on 20.02.2002 and Dr. RK Patel had attended the patient. He was admitted i n ICU for observation. Age of the patient is shown to be 58 years. History of patient was given to the Doctor by one Natubhai Patel. Even then, there is no examination of said Natubhai and there is no mention of the name of Natubhai in the list of witnesses in the final report submitted under section 173 of CrPC.

(xiv) There is no entry in Sarkhej Police Station sending a message of confirmation about the occurrence of incident at Shantivan Farm.

(xv) By not leading clear evidence about the eraser of the signature of the police officer made in the entry of 17.10 hours and not mentioning the details about the presence of the accused at Karnavati Hospital under police surveillance at the instance of PSI Mr. Bodar.

(xvi) Investigation as to who out of three accused

persons had the ownership and control over the read colour maruti car and interrogation of that accused as regards the use of the car on the date of incident.

(xvii) By not asking the Revenue Circle Inspector to draw a detailed map of the entire Shantivan farm and of alleged partition showing wire fencing, its height and total length.

(xviii) By not collecting the evidence as to telephonic connection whether is available in the constructed farm house of the accused.

(xix) By not collecting the evidence from Prerana Hospital whether the hospital authorities were intimated telephonically or otherwise that a patient in serious condition is being brought and hospital authority may keep themselves prepared.

(xx) By not examining Dr. RK Patel as witness in the trial who was responsible for taking the accused from Prerana Hospital to Karnavati Hospital.

(xxi) By not examining the Doctor of Prerana Hospital who had declared the deceased dead and history

if taken by the doctor with papers.

(xxii) By not examining the doctor from Karnavati Hospital who had admitted the convict accused Amrutbhai Patel in the hospital and started giving treatment to the accused, if given and the nature of treatment given.

(xxiii) By not taking the photographs of the spot or area of incident where a ditch for foundation was seen, at the time of drawing of panchanama of the scene of occurrence.

(xxiv) Non-collection of telephone print out of the telephone numbers of Bhaththa so as to collect details as to how many telephone calls were made on the date of incident and at which numbers because the area code suggests that the subscriber of the telephone connection having facility at Bhaththa located in the sim of village Makaraba was a separate exchange.

(xxv) Non-recording of the statement of complainant Artiben after receipt of PM Notes about the time when the deceased had taken supper/lunch and type of food taken by him.

(xxvi) Non-examination of Ambalal Jethidas -maternal uncle-in-law who had made a telephone call at about 10.20 p.m. on 20.02.2002 and informed PW Artiben about the activities or intending activities of convict accused of erecting dividing wall at Shantivan farm.

(xxvii) Non-examination of Dasharath Khodidas-uncle-in-law of PW Artiben who was immediately contacted by complainant Artiben and in response thereto she was told by said Dashrathbhai Khodidas that Arvindbhai is being taken to Doctor House.

(xxviii) By not collecting the evidence as to purchase and use of ammunition by convict accused after interrogation of the convict accused or from the dealers authorized to sell ammunition because the details of such dealers all throughout the State are easily available.

(xxix) By not citing Mr. Chaudhari, Ld. JMFC in final report submitted under section 173 of CrPC as witness though he was a competent witness to prove the statements recorded under section 164 of CrPC;

(xxx) By not intimating the ld. District Judge with confidential report that a particular Magistrate is an important witness in a serious case as the recorder of the statement under section 164 of CrPC, and so if he is to be permitted to leave India, then while according permission to travel out of India, the Investigating Officer may be intimated.

(xxxi) By not citing the wife of the accused as witness who had tendered the muddamal Revolver in presence of Panchas to the Investigating Officer. By not collecting evidence as to how she was able to locate and find out the muddamal Revolver and that too with live and used cartridges which were not found during the first search or visit carried out by the police.

(xxxii) In the panchanama exh.144, a reference of fifth article which is about the sealed packet containing bullet looks like an addition made subsequently after completion of panchanama. Why this situation has cropped up, is a lacuna.

(xxxiii) Non-collection of details as to use of Cellular phone bearing subscriber No. 98240 23981 seized and recovered during the course of investigation from the wife of the accused

Dharmendra @ Tiku Chandulal Patel under the panchanama exh.47. A sim card of this telephone could have been given to the expert in the event of non- co-operation from the witness and there was no reason to put that mobile in the sealed cloth container. The act of seizing of a mobile phone would make such expert investigation practically impossible unless the formality of renewal of seal etc. is again made.

53. As per the settled legal position, the conversation that has taken place between PW Artiben and her deceased husband (i.e. words uttered by the deceased) can not go into evidence because the Apex Court in the case of ***Manish Dixit & Others (supra).***

However, as observed earlier, the say of PW Artiben so far as her say about the receipt of telephone call from Ambalal Jethidas is concerned, would not become inadmissible on the ground of being hear-se. It is true that the facts stated by Ambalal Jethidas to her can not go in evidence as reliable piece of evidence for want of examination of Ambalal Jethidas, but the fact stated by PW Artiben can be believed by the Court that she had received a telephone call from Ambalal Jethidas at about 10.30 and she had uttered the words that her husband had left for Shantivan farm. In the same way, her evidence

about the return of her husband from the farm at about 12.30 p.m. also can go in evidence because this sentence uttered by her would be relevant so far as the time of death of the deceased is concerned and the facts stated by her that deceased Arvindbhai was resting as it was a Sunday. In the same way, for non-examination of Dasharathbhai Khodidas, the words uttered by Dasharathbhai Khodidas can not go in evidence for want of his examination, but one fact can go in evidence and the Court can consider that part of evidence that she had made a telephone call to her uncle-in-law Dashrathbhai Khodidas and she learnt that her husband was taken to the Doctor House because according to PW Artiben, on telephonic message received from Shantivan farm from her driver Dasharath Thakor, she had only learnt that Arvindbhai has been taken to the hospital. So, the place was not known to her and she learnt about the place after her attempt to establish contact with her uncle-in-law Dasharath Khodidas. The fact of leaving deceased Arvindbhai of his house at about 2.30 p.m. at the instance of telephone call received from PW Gulamnabi can go in evidence because it has come on record that she learnt this fact after the conversation between her husband and PW Gulamnabi. On the contrary, it emerges that as the husband was taken rest, at that time, she had received a telephone call from watchman Gulamnabi otherwise PW Gulamnabi would not have uttered words that

“Mota Saheb, Virendrabhai and Tikubhai have come to the farm and they are starting the work of constructing a wall.” As PW Gulamnabi turned hostile, no cross-examination has been made thoroughly by the defence side so the contradiction brought on record by the prosecution are sufficient to place reliance on the version of the complainant Artiben in this regard as reliable piece of evidence.

54. According to us, the panchanama exh.44 requires to be read as a whole because at one place, it is specifically mentioned that panchanama is being drawn to make formal seizure of the articles received from the hospital/doctor and as four articles i.e. cloths etc. of the deceased were not sealed, they were sealed. So, it is very likely that before completion and obtaining signatures of panchas, seizing officer might have realized that formal panchanama is being drawn for all articles received from the hospital/doctor and so it will be necessary to draw a separate panchanama for the sealed box received for making formal seizure or it can be mentioned in the panchanama drawn for seizure of other four articles that were sealed in the presence of panchas. It is not the case nor the allegation that no bullet was ever taken out of the body nor the same was sealed by the doctor or handed over in a sealed container to police. On the contrary, evidence of Dr. Bhise is very

clear on this point. So, the addition of anything at Sr.No.1, if is made at any time during the drawing of panchanama and obtaining signature of panchas or while signing the panchanama drawn in presence of the officer, the reference of fifth article received from the doctor can be mentioned. According to us, this is not an infirmity or interpolation in the record at all because the resultant effect would be nil looking to the other reliable and satisfactory set of evidence. Out of above infirmities, many infirmities could have been resolved either by the ld. PP or by the Court and nobody had prevented the ld. PP to request the Court to direct the police to investigate in the necessary directions. Telephone print out etc. could have been obtained and produced in the Court by carrying out further investigation. Same exercise could have been undertaken qua the identity of the red colour maruti car. It is relevant to note that the car was recovered at the instance of accused No.2 Virendra. He is resident of Krishna Society, Law Garden. The car recovered vide panchanama exh.125 bears registration No. GJ-1-BP-1874. Engine & Chasis number are also mentioned along with the colour of the car. Ignoring inadmissible part of this panchanama being bracketed, it is satisfactorily established that the car belongs to accused No.2 Virendra and was found lying un-attended. This panchanama exh.125 is an admitted document as per the endorsement

made in the list of documents exh.33. Of course, the FSL examination may not have taken the Court or the prosecution any further, but to link the accused Nos. 2 & 3 with the crime. That part of evidence could have helped the prosecution materially. In the same way, the investigation as to the use of cellular phone of one of the accused may have added some strength in the case of the prosecution qua that part of the evidence of the accused. Out of above infirmities, the infirmities at Sr. Nos. (iv), (v), (xi), (xii), (xiv), (xviii), (xxix) and (xxxiii) (total 8 infirmities) are the infirmities individually or collectively not capable of destroying the strength of the case of the prosecution. On the contrary, as observed earlier, could have added more strength to the case of prosecution. Merely because the medical papers from Prerana Hospital have not been recovered nor the doctor of these two hospitals have been examined, would not nullify the effect of the evidence of prosecution that the injured Arvindbhai was taken to Prerana Hospital and at that time, all the three accused persons were there, two have participated in bringing the deceased to Prerana Hospital in presence of complainant PW Artiben or convict accused was taken to Karnavati Hospital from Prerana Hospital. It is true that as per the rule of best evidence, the prosecution should try to lead the best evidence and if a document is a best evidence, then such a document also should be

brought on record, but according to us, the documents of these two hospitals were not the best evidence , but the same could have been used as a corroborative piece of evidence to the first hand to the direct evidence on all these relevant aspects brought on record by the prosecution. The certificate issued by Karnavati Hospital exh.119 is an admitted document. So, the contents of the documents can be read in evidence and this certificate indicates that the patient was neither serious nor critical. He was not even unconscious and he was kept in ICU for observation. The doctor found some pain and injury on the finger of right hand. We would like to mention the exact word mentioned in the certificate which read thus:-

“H/o Scrotal Injury & Rt. Finger pain”.

This document being an admitted document can be considered while appreciating the conduct of the accused and the allegations made against the accused that he has fired muddamal Revolver. When his presence at the spot of incident is challenged on account of inadequacy of the evidence, the reference of the injuries mentioned can be considered. So, we are not inclined to accept that any of the above-said infirmities has caused any serious prejudice to the defence. On the contrary, the prosecution has been deprived of brining more strong case i.e. stronger than the present one against convict accused. We are of the view that the probability of this

evidence may have resulted into conviction of accused Nos.2 & 3 then that of acquittal recorded by the ld. Trial Judge. As per PSI Bodar, one Dr. RK Patel has requested him to permit him to take Amrutbhai Patel to Karnavati Hospital. The contents of the certificate exh.119 suggests that one Dr. RK Patel had attended the patient. In absence of any specific fact situation, a reasonable inference can be drawn by the Court that Dr.RK Patel who attended the patient must have attachment with Karnavati Hospital. So, a doctor of Karnavati Hospital had rushed to Prerana Hospital for seeking permission from PSI Mr. Bodar. The Court is not concerned with the conduct of Dr. RK Patel, but before permitting accused Amrutbhai Patel to leave Prerana Hospital, PSI Mr. Bodar ought to have inquired about the benefit. Somebody must have informed Dr. RK Patel from Prerana Hospital to come down to Prerana Hospital for a specific purpose and the person who arranged for the arrival of Dr. Patel of Karnavati Hospital, ultimately succeeded in taking the convict accused from Prerana Hospital to Karnavati Hospital i.e. from a place where he could have been arrested immediately on registration of offence or even prior thereto by PSI Mr. Mer and could have interrogated thoroughly. These efforts to get out of the clutches of the police is a circumstance against the accused when he claims to be an innocent person loosing a young son in an unfortunate incident.

55. Here, we would like to refer to some part of evidence of PSI Mr. Mer because according to us, he is also one of the responsible officer for number of infirmities that has emerged in the case on hand. At page No.831 of the paper-book, i.e. in his deposition exh.122, he has stated that after recording of the statement of PW Gulamnabi Mubarakkhan, he had gone to Karnavati Hospital as he came to know that the accused is in Karnavati Hospital. At that time, Dr. Kishore Patel and Dr. RK Patel had informed him that the accused is not well, he is unconscious and is not able to speak and, therefore, he returned to police station. There is no reference in the deposition about asking of the certificate on that day. It appears that he had never informed about the state of mind of the accused because there is nothing in the document exh.119 dated 20.02.2002 that the accused was unconscious or was otherwise unstable, not able to make any statement. He was kept in ICU for observation only. On 21.02.2002 also, he had met Dr. Dave and Dr. Patel and not to the patient. Thereafter, on 24.02.2002, PSI Mr. Mer had gone to Karnavati Hospital and at that time, Dr. Dave told him that he i.e. Dr. Dave would like to shift him to Civil Hospital, Ahmedabad and Dr. Dave was asked whether the accused can make movements and he had opined that he is not in a position to move. Thereafter, the wife of accused Shantaben was asked to

produce cartridges from her residence i.e. Bungalow No.10 of Unique Park. Accused Nos. 2 & 3 were not traceable even on that day i.e. 24.02.2002 and he was also inquiring about other two accused persons. One son Arvindbhai has expired in an unfortunate incident. It is claimed that accused No.1 Amrutbhai was in ICU. Even then, accused No.2 -the other son Virendra was not traceable to the police, is the suggestion emerging from the evidence of PW Mr. Mer, Investigating Officer. This indicates so many things and this Court being not the trial Court and had not an opportunity to seek explanation of Mr. Mer on this point, we would refrain from making any comments on this part of evidence. There may be more than one reasons, but it is difficult to accept for us that the visit of Ambalal at Prerana Hospital was an innocent visit and it is not contrary to his innocence when the body of deceased Arvindbhai was at Prerana Hospital otherwise at 17.39 hours, the accused would not have reached Karnavati Hospital and get himself admitted in Karnavati Hospital by calling Dr. RK Patel from Karnavati Hospital. It is inferable unreasonable that somebody from accused has arranged for arrival of Dr. RK Patel from Karnavati Hospital to Prerana Hospital.

56. The same is our reaction qua the deposition-contents of the version of PC Mahendrakuamr Prajapati because he has deposed in the Court in response to the

question asked during the course of cross-examination that he had accompanied the convict accused to Karnavati Hospital from Prerana Hospital. A police constable whether would ask his PSI whether he had recorded any complaint or not is the question. This material improvement has been made by this witness and it has been rightly brought on record by putting certain questions during re-examination of this witness and he has admitted that he has not stated so in his statement before the Investigating Officer. In the same way, he has no business to ask Mr. Bodar whether the names of the accused have been disclosed otherwise he would have stated these facts in his examination-in-chief. This witness PC Mahendakumar Prajapati was very well aware at 3.45 p.m. that an incident of firing had taken place at Shantivan farm and one person had sustained injury and police help was sought from Ellisbridge Police Station. At that point of time only, Sarkhej police should have been and could have been informed. After examination-in-chief, in the cross-examination, this witness has attempted to oblige the defence side, is our impression from plain reading of his cross-examination and it appears that inaction on the part of ld. Spl.PP at that relevant point of time, had compelled him to re-call that witness after a lapse of certain days i.e. on 12.08.2002. The date of his deposition is 17.07.2002. This witness is introducing a story contrary to the case

of prosecution in para-4 of his deposition, otherwise, Mr. Bodar was aware, as discussed earlier, about the name of the person who had fired a bullet.

57. It is argued that entry Exh.107 was not given to the accused along with the papers of chargesheet and the same has been produced at the instance of accused, but it is wrong to say that it was not produced. Copy of the entries were produced before the Court. Entry exh.105 is equal entry No.107. It is true that a zerox copy of the original was not given to the accused, but as discussed earlier, in reference to the context to other entries of the very Register, rules out the possibility of entry of 17.10 hours of Sarkhej Police Station as the entry being ante-timed.

58. Photographs of the place of incident were taken and they were brought on record. There are about 16 to 17 photographs. Of course, these photographs have not been admitted in evidence nor they have been proved by examining the photographer because the list of document does not bear any endorsement as to admission of these photographs. Some photographs are of the dead body of deceased Arvindbhai, but this aspect would not in any way help the defence side nor is damaging the case of prosecution because it is possible to argue that the photographs have been taken after a lapse of some hours

so that the things can be changed or altered during these hours.

59. So far as the evidence of PW Artiben as to conversation that has taken place between her and her husband is concerned, may not go in evidence in view of the embargo of section 32 of the Evidence Act. According to us, the decisions cited by Mr. Thakkar referred to herein above in the case of ***Manish Dixit (supra) ((2001) 1 SCC 596 = AIR 2001 SC 93),*** would not squarely help the accused because in the cited decision, the prosecution was attempting to get the statement of one Michael Hens made by this witness to the inmates of Gulshan Makhija, and it was contended that it would fall within the purview of section 6 of the Evidence Act. According to us, even if the ratio laid down by this cited decision is accepted, the response given by PW Arvindbhai to the words uttered by her husband and the fact of feeling of satisfaction which she noticed on his return from Shantivan farm and thereafter his leaving the house for Shantivan farm at 2.30 p.m. again, positively can be read as admissible piece of evidence in the background of the scheme of section 6 of the Evidence Act. A suggestion made to this witness PW Artiben in para-7 of the cross-examination assumed importance wherein she was asked whether after receipt of telephone call from Gulamnabi informing that the accused are starting the construction

whether the police was informed, and in response thereof, she had replied to the defence counsel that the police was not informed and she herself was the receipeant of the telephone call from driver Dasharath i.e. telephone received by her after the incident. Some conflict in sequence of conversation and actual words of conversation used by PW Artiben, her father Bharatbhai or her brother is found natural and no impression is created in the mind of the Court that they had given some answers showing their ignorance even on material aspect, was an attempt by each witness to suppress something. On the contrary, the plain reading of the evidence gives an impression that they had very little thing to suppress or to exaggerate. In the same way, the information received by PW Artiben that Amrutbhai is being taken to Prerana Hospital, would not hit by section 60 of the Evidence Act because her say is that before see could inform about the message received from driver Dasharathbhai- person at the other end of telephone call had informed something more to her. There is no material contradiction on the point. This witness is also not found making any improvement. There is no modulation in the theory before the Court and the theory unfolded before the police. For short, the ratio of the decision in the case of **Vijender v/s State of Delhi, 1997 SCC (Cri.) 587,** reiterates a settled principle of law, would not come in the way of the prosecution and the evidence of PW Artiben and these

crucial aspects can not be brushed aside by holding that the same can not be read as a legal piece of evidence.

60. The injuries sustained by the injured, as opined by Dr. Bhise was a fire arm injury by a shot fired from a close range. The body part selected for a close range fire automatically indicates the intention. The degree of entry of the bullet inside the body also rules out the shot being fired during scuffle because it was otherwise possible to over power the deceased as there was no group assault from the other side on the convict accused, otherwise, the accused could have sustained number of injuries. So, the probability factor when is found to be out of tune and too remote, it is not even possible for this Court even indirectly to think that something must have been done in private defence, otherwise the deceased injured would not have sustained 9 injuries on his body.

61. It is true that accused Nos. 2 & 3 who were very well present could have over-powered the accused by snatching away the weapon from him, but the Court is not aware about the distance between the convict accused and other two and inaction of such nature whether can be said to be an omission within the meaning of section 107 of IPC would be again a question, otherwise in absence of evidence as to criminal and willful omission on the part of accused Nos. 2 & 3, it is difficult for the Court to

implicate accused Nos. 2 & 3 either as a conspirator or a person sharing intention with the convict accused or an abettor. Nobody must have expected that some scuffle would result into such a serious incident or commission of such a serious offence. So, the ld. Trial Judge of course for the reasons recorded in the judgment under challenge, has rightly not linked accused Nos. 2 & 3 with the crime of murder. There is no positive evidence on record to show that one stick found from the spot was used by any of these two accused i.e. accused Nos.2 & 3, though other injuries on the body of the person deceased was possible by this very weapon. But ultimately, it is a one stick and one stick can not be used by two accused persons. So, the view taken by the ld. Trial Judge acquitting the accused Nos. 2 & 3 is not required to be disturbed because the jurisdiction of this Court while dealing with acquittal appeal, as per settled legal position, is limited and in absence of any perversity or patent illegality in the ultimate finding of acquittal, the acquittal recorded by the trial Court is not required to be disturbed. So, in our view, the judgment under challenge in both these appeals is a well balanced judgment. It is true that some errors are there in appreciating the evidence and some inadmissible portion of evidence has been taken into account knowingly or unknowingly by the trial Court and, therefore, we have made an endeavour to evaluate the judgment in the

totality and keeping in mind the evidence available on record and we have appreciated the evidence in accordance with the submissions made on behalf of the appellant convict because it was one of the submissions advanced before us that this Court should evaluate the entire evidence afresh and reach to its own finding in view of the jurisdiction vested with the Court under section 374 R/w section 386 of CrPC.

62. According to us, non-co-operation from Ambalal Jethidas or from Dasharathbhai Khodidas would not destroy the effect of the evidence of Artiben as discussed earlier. Merely because watchman Gulamnabi and driver Dashrathbhai Thakor has not supported the case of the prosecution, the evidence as to conversation that has taken place between PW Artiben and these two witnesses available on record can be considered and accepted as reliable piece of evidence and we accept this part of evidence as reliable piece of evidence. Non-production of the statements recorded of Gulamnabi and Dasharathbhai Thakor would not nullify the evidence that has come on record during their examination in the Court and the same part of evidence of these witnesses can be made use of by the prosecution and we have appreciated the entire evidence in light of the submissions made by ld. APP Mr. Dave. Confession of the accused made by PSI Mr. Bodar is

inadmissible in evidence, but the conviction recorded by the ld. Trial Judge is not solely based on such admission. In spite of the conflict in the opinions as to the measurements of the bullet by two different experts, we have answered the proposition placed before us by Mr. Thakkar in the background of other evidence as to the sealing of muddamal mark-"F" bullet and we are not able to accept the submission made in this regard and there are no two sets of evidence as observed earlier. There is no conflict with the time of the death of the deceased and it is clear from the evidence that the deceased was declared dead when he was brought to Prerana Hospital. When panchanama exh.125 is an admitted document and the cover is recovered at the instance of one of the accused namely accused No.2 Virendra, we do not find that there was any need to bring documentary evidence as to the ownership of the car. The hostility of number of witnesses who were actually present on the spot, makes the present case a case based on circumstantial evidence from a case based on both the types of evidence, but when the case of the prosecution has remained substantially the same, it is possible for the Court to link the accused with the crime. We are not in agreement with the submissions made by ld. Sr.Counsel that there is no chain of circumstance which can be said to be inconsistent to the innocence. According to us, the circumstances emerging from record in the nature of the evidence

available, is sufficient to say that no inference other than the guilt of accused No.1 is possible to be recorded. Obviously, we are also not able to accept the say that the prosecution has even failed to prove the place of incident and the conflict in opinion of Dr.Bhise and Mr. Modi is unreasonable. Here, we would like to reproduce certain observations made by the Apex Court in the decision in the case of **Mani Ram v/s State of Rajasthan, AIR 1993 SC 2453,** wherein the Apex Court has observed thus:

> "8. The pistol, weapon of offence, was taken into possession from the appellant by P.W.6 SHO Bhim Singh. It is a licensed pistol of the appellant. According to the evidence of ballistic expert P.W.11, the empty cartridges sent to him for examination had been fired from the pistol and that pistol alone and from no other similar weapon. Of course, the sealed packets containing the pistol and cartridges were sent to the ballistic expert after a long delay and that could have created some doubts about the possibility of substitution of the cartridges, while the packets remained with the police but the evidence on the record rules out any possibility of such a substitution. The three sealed packets, one containing pistol, the second, containing the empty cartridges recovered from the

spot and the third, containing the three empty cartridges recovered from the appellant along with the pistol were deposited in the malkhana of the police station. They had been received by Head Constable Mani Ram P.W.10 on 23.06.1972, the very next day after the occurrence. He had sent the same to the police lines at Ganganagar. The prosecution examined P.W.12 Amar Singh who had carried the three packets from the police station to the police lines at Ganganagar. He categorically stated that while the packets remained with him, they were not tampered with at all. P.W.10 Mani Ram also deposed that during the period, the sealed packets remained in the malkhana, they were not tampered with by anyone and that they were handed over to Amar Singh P.W.12 in the same condition. According to P.W.7 Ram Chandra, he received the three packets from Amar Singh and after taking them into custody he made an entry in the register and that while the packets remained in his custody, nobody tampered with them. The packets were sent to the ballistic expert and received there by Jaswant Singh P.W.8 and Mamraj Singh. Jaswant Singh, appearing as P.W.8, deposed that he delivered the packets to the ballistic expert on the very next day after receiving them and while the packets remained in his custody, nobody tampered with them. According to the Ballistic

expert, p.P.W.11, the packets when received by him were properly sealed and the seals were intact and tallied with the specimen of the seal sent to him. None of these witnesses were at all cross-examined. No suggestion even was made to anyone of them that the sealed packets had allegedly been tampered with while in their custody. No such suggestion was even made to SHO Bhim Singh P.W.6 that he had either substituted the cartridges sent to the ballistic expert or otherwise tampered with the sealed packets. It is, therefore, futile to contend that the possibility of the substitution of the cartridges could not be ruled out. There is no basis for such an argument. The evidence of ballistic expert, Shri G.R.Prasad, P.W.11, read with the medical evidence of P.W.9 and the testimony of the eye-witnesses P.Ws.1 and 2 clearly establishes that the appellant had fired from his licensed pistol at the deceased and that the deceased died as a result of the pistol shot injuries received by him. We agree with learned Judge of the High Court that there are no suspicious features at all appearing in the evidence which may cast any doubt on the prosecution version that the deceased was shot at with the pistol by the appellant and that he died as a result of the injuries so received."

In view of above, according to us, the facts established are consistent only with the hypothesis of guilt of convict accused and excludes every hypothesis of his innocence and the chain of evidence reasonably takes us to a conclusion that nothing is inconsistent with the guilt of the accused.

It is also not possible for us to predict the ground realities or the difficulties and apprehensions in the mind of the ld. Spl.PP. So, without making any comments on the aspect, it is necessary for us to observe that no good reasons are emerging for not examining Ambalal Jethidas and Dashrath Khodidas. Similarly, Dr.RK Patel who took the convict accused to Karnavati Hospital, Natubhai Patel who gave history to the doctors of Karnavati Hospital, Shantaben- wife of convict accused as well as photographer who had taken about 17 photographs, have not been named in the chargesheet and in the list of 53 witnesses cited and could have been examined as emerging from record. For no good reasons they have not been examined. The Court could have thought to call all of them or some of them as witnesses in exercise of the powers vested with it under section 311 of CrPC, but this by itself, is not found a fatal infirmity.

63. We are not in agreement with the submission made by ld. Sr. Counsel Mr. Thakkar that the convict accused

being a very rich man of the city of Ahmedabad having huge immovable properties, he was subjected to a media trial and the ld. Trial Judge perhaps was under the influence thereof and, therefore, he has drawn certain conjectures and finding is recorded on some assumption and presumptions in absence of linking evidence. It is true that in some cases, media reporting either destroys the case of the prosecution or unduly helps the prosecuting agency, but when this Court has evaluated the evidence practically denovo and in accordance with the submissions made before the Court by both the sides, it is not possible for the Court to say that the role of media had taken the accused to the prison instead of the linking proof. Complainant PW Artiben also can be said to be a rich lady as her husband was also a known builder and she is also hailing from a very wealthy family and at her instance about three Spl.PPs have appeared in the trial, is her say. But on a plain reading of the evidence, an impression is created in our mind that this has not in any way caused prejudice to the accused, but to some extent, has affected the case of the prosecution and, therefore only, there was some scope to develop such type of arguments. We would not like to comment on this point because it would amount to criticizing a particular prosecutor. Ultimately, the Court should not ignore one fact that PW Artiben- complainant was a lady struggling to see that the truth prevails. It is not

possible for this Court to accept that by delayed FIR, all the accused were implicated by a literate and wealthy daughter-in-law with the help of police. We have observed by assigning reasons that this case does not fall in the category of the delayed FIR or a FIR concocted after deliberations because at the first instance, one would infer that all the three accused must be responsible for the commission of the offence especially when number of injuries were of different nature and more in number on the body of the person deceased and nobody else was the person present on the spot when the incident occurred who could have assaulted in such a serious manner and that too in the presence of his father, real brother and brother-in-law. For short, we do not find any merit in the appeal filed by the convict accused because ultimately, the finding of the conviction and sentence passed by the trial Court against convict accused No.1 is sustainable. In the same way, the appeal filed by the State against the order of acquittal recorded against accused Nos. 2 & 3 by the trial Court, deserves to be dismissed for the reasons assigned in this judgment. It is not possible for this Court to link any of these two acquitted accused with the crime as there was no scope to conspire or to join with the intention of the convict accused and there is no sufficient evidence to link the accused with the crime even as an abettor. Mere presence of accused Nos. 2 & 3 at Shantivan Farm would not be a

sufficient proof as to their presence at Shantivan farm at the time of incident and is not enough to reverse the finding of acquittal recorded in favour of accused Nos. 2 & 3 merely because some other view could have been taken by the trial Court. In our view, no other view than that of acquittal was possible in case of accused Nos. 2 & 3 are concerned and they could have been given benefit of doubt at least. So, we also dismiss the criminal appeal preferred by the State against the order of acquittal recorded by the trial Court in favour of accused Nos. 2 & 3 and confirm the order of acquittal passed by the trial Court. In nut shell, both the criminal appeals arising of the impugned judgment of the trial Court are hereby dismissed. The impugned judgment and order of conviction and sentence recorded against the convict accused No.1 is hereby confirmed and consequently, Criminal Appeal No. 1459/2004 preferred by the convict accused No.1 Amrutbhai Patel is hereby dismissed. In the same way, the order of acquittal recorded in favour of accused Nos. 2 & 3 vide impugned judgment by the trial Court is also hereby confirmed and consequently, Criminal Appeal No. 856/2005 preferred by the State of Gujarat against the order of acquittal of accused Nos.2 & 3, is also hereby dismissed. Orig.accused nos.2 and 3 are on bail. Their bail bonds stand discharged.

64. Before parting with the judgment, we would like to mention with anguish and anxiety three aspects; viz

(i) That the State Government, if interested in absolute rule of law, should consider the observations made by us against the police officers named in the judgment and in relevant paras and in the background of total discussion of the evidence. We are no condemning these witnesses as an individual at this stage. However, we are inclined to observe that a thorough inquiry requires to be made by the Home Department against the said three police officers viz. (i) PSI Mr. Bodar (of Ellisbridge Police Station at the relevant time), (ii) PSI Mr. Mer (of Sarkhej Police Station at the relevant time) and (iii) Police Constable Mahendrakumar Prajapati (of Ellisbridge Police Station at the relevant time) and Home Department should reach to a conclusion whether is there any possibility to initiate any departmental proceedings against them or any of them for their inaction or over-action as persons on duty because one of us as a Judge of this Court is aware about the steps being taken by the Ellisbridge Police in a case wherein the injured was taken in a car to the hospital and steps were taken by the police immediately thereafter against the driver of the car and to collect the evidence from muddamal car forthwith. Hence, why such or similar actions were not taken in the present case etc. are the questions which require to be answered and Home Department is

the only machinery which can undertake this task efficiently and objectively. Till then, none of these three police officials, if they are in service, should be entrusted investigation of any serious or sensitive crime or should be permitted to participate in investigation of such type of serious or sensitive cases/offences.

(ii) The state Government, in consultation with the establishment of the High Court, should carve out a policy in reference to according of a sanction to a judicial officer to leave India and accept resignation from the post of a judicial officer and that too when it is pointed out specifically that after leaving the department, the officer would leave India, because in the present case, resignation of the ld. JMFC, Ahmedabad (Rural) Mr. Chaudhari who recorded the statements of PW Gulamnabi and PW Dasharathbhai Thakor has resulted into prejudice to the prosecution for non-examination, otherwise the trial Court and/or this Court could have issued notice initiating appropriate legal action for stating something contrary to the statements given by them under section 164 of CrPC, otherwise in a tricky way, one can destroy an important relevant part of the evidence collected during the investigation.

(iii) That when we had started dictating judgment in the present case, shockingly and surprisingly some inquiry was made from the Registry and an attempt to have papers was also made, but as the paper book and relevant notes were at the residence of one of us, only the Court docket was called from the Court Sheristedar and on inquiry with the officer who had tried to collect the High Court Dockets and papers of appeal from one of us, we are informed that at the instance of the Hon'ble Chief Justice and one Senior Brother Judge, he had made that attempt because the Registry was asked to tender some information as to how and why these appeals are heard expeditiously being comparatively new as compared to other pending criminal appeals etc. We are also informed that nothing was required to be done otherwise in the matter and some explanation was sought from the criminal department who has listed the matters before the Court. We could have mentioned the name of the officer as well as the name of the Hon'ble Senior Judge. However, rule of decency and judicial decorum forbids us from doing so. It was not impossible to avoid this unhappy situation because the Court had undertaken hearing of appeal for several days and ld. APP had argued for 1 ½ days fully to meet with the arguments. The court was informed and submissions were made by the ld. Sr.Counsel Mr. Thakkar that as

more than two Benches have said that the matter may not be listed before them and so the Hon'ble the Chief Justice assigned these matters to this Bench and in light of earlier judicial order and old age of the accused, his deteriorating health and heart-disease and when he has now developed psoriasis, the Court should hear these matters otherwise there is no use in listing these matters before this Bench only for the sake of getting them adjourned. Ld. APP Mr. Dave had also consented for hearing. It is true that number of matters older than the present one are pending for disposal and the accused are awaiting for expeditious hearing of their respective appeals, but since the Bench was dealing with acquittal matters at that relevant point of time, a request advanced by ld. Sr.Counsel Mr. Thakkar was acceded to. If anybody sitting in the establishment of the High Court was of the view that though the matters were listed before us, we should not hear the matters or some other Bench should undertake the hearing, then the matters ought not to have been listed before us. We have reasons to treat these matters as specially assigned matters being listed before us. After completion of hearing and that too knowing it well that now the appeals are posted for pronouncement of CAV judgments, the exercise to call for papers and the Court dockets to secure the files if they are

available with the chamber, was not required at all. We do not say that this is contemptuous, but the establishment of the High court should exhibit some wisdom at each stage and each movement before assigning the matters and listing the same for final hearing. Some, administrative error even if was committed by the Criminal Board Department, under an oral indication, we could have derailed hearing and would have directed the Registry to obtain appropriate orders from the Hon'ble Chief Justice. Our say is that the things that had happened after completion of hearing of appeals and that too after some days of the completion of hearing, has created lots of frustration and disappointment in our mind. Of course, we may say that this avoidable contingency has no effect or impact on our ultimate finding and we have tried to deal with the matters to the best of our ability, faith and consciousness in discharging our functions as Judges of this Court.

[C.K. BUCH, J]

[K.A. PUJ, J]

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